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THE

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS

AND THE

VICE-CHANCELLORS.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

HARRIS *v.* PEPPERELL.

M. R.
1867
Nov. 7, 8, 13.

Vendor and Purchaser—Suit to rectify Conveyance—Mistake—Option to annul Contract—Costs.

The rule that the Court will not interfere to rectify an instrument unless it is proved that the mistake was common to both parties, does not apply to the case of a contract which has been executed between parties in the relation of vendor and purchaser, whom it is in the power of the Court to replace in their original position.

Accordingly where, in a conveyance of messuages, the plan on the deed comprised a piece of land not intended by the vendor to be included, a decree was made to rectify the deed, an option being given to the purchaser to have his contract annulled; but, having regard to the conduct of the parties, no costs were given on either side.

4 DeG F & J 28
8 Eq 105
13 Eq 430
14 Eq 89
150
6 HL 228
9 Ch 744
20 Eq 777

THIS was a suit by a vendor to rectify a conveyance on account of a mistake in the quantity of land therein comprised.

The Plaintiff, who was a builder, was owner of a piece of land on which he had erected six houses, each of which had a frontage of twenty-one feet, and was enclosed with garden walls to the depth of 111 feet, and at the rear of the houses, abutting on the wall, the Plaintiff had reserved a footpath of ten feet, beyond which was a vacant piece of land on which he intended to build.

The Plaintiff employed *Owers*, a house-agent, to sell the houses, who, in September, 1865, negotiated with the Defendant for the

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sale of two of them, which were built on the plot numbered twenty-one in the plan, for £1000. The Defendant paid £100 as deposit, for which *Owers*, on behalf of the Plaintiff, gave him a receipt "as part payment of the sum of £1000 as the purchase-money of two houses in *Teddington*, the purchase to be completed on the 20th of October next."

There was no other written contract.

The abstract was delivered and the requisitions replied to, but there being some confusion as to the quantity, the Defendant's solicitor wrote to the Plaintiff's solicitor on the 24th of January, 1866, to inquire whether the property purchased was described to be "plots 21 and 22," and sent a ground plan which he proposed to put on the deed of conveyance.

The Plaintiff's solicitor, on the 29th of January, replied that they were built on "plot 22," and sent him, on a fly-leaf of the letter, a correct plan of the plot intended to be conveyed. He afterwards returned to the Defendant's solicitor, at his request, the plan which accompanied his letter of the 24th of January.

On the 7th of February, the Defendant's solicitor sent the engrossment of the deed of conveyance, which the Plaintiff executed The plan was not examined by his solicitor, who assumed that the plan was identical with the one sent by him on the 29th of January.

In May, 1861, the Plaintiff contracted to sell other part of his property, and discovered, for the first time, that the plan on the conveyance comprised a portion of the footway at the rear of the property, and also part of plot 22, which were not included in the plan last sent.

The Plaintiff's solicitor at once apprised the Defendant's solicitor, and a correspondence ensued, which resulted in the present suit.

The bill prayed a direction that so much of the lands conveyed by the indenture as comprised the additional strip of land was not intended to pass, and that the beneficial interest therein did not in equity pass by the deed, and that the Defendant might be declared to be a trustee of the legal estate in such portions for the Plaintiff, and might be decreed to convey the same.

The Defendant denied that there was any mistake as far as his solicitor and himself were concerned. He alleged that he was

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misled by the abstract and the replies to his requisitions, and explained the circumstances under which the plan comprising the alleged excess of land was put on the conveyance.

Mr. *Southgate*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff:—

The evidence shews that there was a clear mistake in the plan on the deed, and the Plaintiff is entitled to relief in this Court, he offering to cancel the contract and repay the purchase-money. Where a mistake in an instrument is clearly established, then the Court will interfere to rectify it: thus in *Mortimer* v. *Shortall* (1) a decree was made to rectify a lease containing a larger quantity of land than was intended to be included in it, and in *Garrard* v. *Frankel* (2), where there was an agreement for a lease at a rent of £230, and a lease was executed, under a mistake, reserving a less rent, the Court gave the lessee the option of taking his lease rectified according to the agreement, or of rejecting it. So in *Harryman* v. *Collins* (3), where *A.*, the first mortgagee of one property, joined with *B.*, the second mortgagee of the same property, who was also first mortgagee of another property, in a demise of both estates, reserving all the rent to *A.*, the Court relieved *B.*, who had joined in the demise in ignorance of his rights, by ordering *A.* to pay him an apportioned share of the whole rent. *Murray* v. *Parker* (4) was also a case where a lease was ordered to be reformed.

Mr. *Baggallay*, Q.C., and Mr. *Marten*, for the Defendant:—

We admit that where a mistake is common to both parties the Court will rectify the instrument, but it is different where the mistake is on one side only, and the contract has been completed, for then the Court will not interfere: *Earl of Bradford* v. *Earl of Romney* (5). This was also laid down in *Sells* v. *Sells* (6), where the Court refused to rectify a marriage settlement prepared pursuant to the intention of one party, but under a mistake as to the other. In the present case the error was not common to both parties, for though the vendor considered that he was selling the smaller quantity of land, the purchaser thought at the time of the

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(1) 2 D. & War. 363.
(2) 30 Beav. 445. 8 Jur NS 985
(3) 18 Ibid. 11, 18 Jur 501
(4) 19 Beav. 305.
(5) 30 Ibid. 431, 8 Jur NS 403
(6) 1 Dr. & Sm. 42.

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contract that he was purchasing the whole of the land at the rear of the houses delineated on the plan. We submit that it is not a case in which the Court will rectify the deed or annul the sale.

Mr. *Southgate*, in reply.

Nov. 13. Lord Romilly, M.R., after stating the facts of the case, continued:—

c 9 s 797

The first defence set up by the Defendant is that, in cases of mistake arising in deeds, the Court will not interfere to rectify the error unless it is clearly proved to have been common to both parties, and in support of this view the case of *Earl of Bradford* v. *Earl of Romney* (1), which was a decision of mine, was cited. Against this another decision of mine, in *Garrard* v. *Frankel* (2), was cited on behalf of the Plaintiff, where a lease was executed reserving a rent of a much less amount than was intended, and the Court interfered to relieve the lessor. These decisions may seem at first sight inconsistent, but they both appear to have been acquiesced in, and were not appealed from, and they are, in my opinion, easily reconcilable, and both correct.

Where, as in the case of *Earl of Bradford* v. *Earl of Romney*, there has been a settlement on marriage, and the marriage has taken place, and children have been born, then, if the Court is called upon to rectify the instrument on the ground of mistake, it is necessary for the Court to see whether it is carrying into effect the contract which was intended to be entered into on both sides, for it is impossible to undo the marriage, or to remit the parties to the same position that they were in before. In such cases, therefore, the Court acts with great caution in granting relief, and requires proof of the exact contract which both parties intended to enter into.

14 Eq 69

But the same rule does not apply in cases arising between vendors and purchasers (using these words in their widest sense). In such cases, where a deed is not actually executed, the Court will not enforce specific performance of a contract which one party has entered into under a mistake, and where, as in *Garrard* v.

(1) 30 Beav. 431, 8 Jur. N.S. 403. (2) 30 Beav. 445, 8 Jur. N.S. 985

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Frankel (1), a person supposes that he has entered into a contract for a lease at one rent, and then it turns out that the rent specified is of a different amount, then, as it is in the power of the Court to put the parties in the same position as if the contract had not been executed, the Court will interfere, provided the party aggrieved comes speedily for redress.

In the present case it is clear that the Court can put the parties in the same position as before the conveyance was executed, for if I hold that there has been a mistake, and that the deed ought to be rectified, then I can give the Defendant the option of having the whole contract annulled, or else of taking it in the form which the Plaintiff intended. It is, therefore, a case where the Court can grant relief, and I am of opinion that the mistake was clearly proved. [His Lordship then stated the result of the evidence on this point.]

The deed, with this error in the parcels, was executed by the Plaintiff without any examination, and he did not discover it till he was on the point of selling the plot to which the piece of land in question was supposed to belong, when he discovered that it was already included in the conveyance to the Defendant.

With regard to costs in such cases, they must depend on the conduct of the parties. When the mistake is entirely owing to the conduct of the Plaintiff, then he must pay all the costs of the suit. When the Defendant has been aware of the mistake from the beginning, and refused to rectify it, then the costs must be given against him. In the present case it is clear that the Defendant, if not aware of the mistake at the time of the execution of the deed, knew it as soon as the Plaintiff told him. On the other hand, the negligence on the part of the Plaintiff is inconceivable, for he allowed this additional piece of land to be in the plan, and never caused it to be examined to see whether it was correct. It is a case of gross negligence on his part, and therefore no costs can be given on either side.

There will be a declaration that the Plaintiff did not intend to convey the additional strip of land in question, and is entitled to have the conveyance rectified accordingly, with an option to the Defendant to annul the contract.

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(1) 30 Beav. 445, 8 Jur NS 985

M. R.
1867
Nov. 18.

In re BLAKELY ORDNANCE COMPANY.

STOCKEN'S CASE.

Company—Calls—Forfeiture for Non-payment—Interest.

The articles of association of a company provided that if any member failed to pay any call due from him at the time appointed for payment thereof, he should be liable to pay interest for the same at the rate of 25 per cent. from that time to the time of actual payment; and also that the forfeiture of any share should involve the extinction at the time of the forfeiture of all claims and demands against the company in respect of the share, and all other rights incident to the share; but any member whose share had been forfeited was, notwithstanding, to be liable to pay to the company all calls owing on such shares at the time of forfeiture:—

Held, that a member whose shares had been forfeited was liable to pay calls owing at the time of forfeiture, but not any interest thereon.

Affd 3 Ch 412.

THIS was an adjourned summons.

Mr. *Stocken* was the original allottee of fifteen shares in the *Blakely Ordnance Company, Limited.* On the 28th of August, 1865, the directors made a call of £5 per share, payable on or before the 14th of September following; and on the 29th of August notices of the calls were sent by the secretary of the company to the shareholders. Mr. *Stocken*, however, deposed that he did not receive the notice addressed to him; and, in fact, had no notice of a call having been made until November, 1865. On the 16th of that month Mr. *Stocken's* shares were forfeited by the directors. Subsequently the company was ordered to be wound up. The validity of the forfeiture was not disputed; but the question was raised whether Mr. *Stocken* was liable to pay interest on the amount of the call by virtue of the provisions contained in the following clauses of the articles of association of the company:—

"44. Whenever any call is made, fourteen days' notice of the time and place of payment thereof shall be given to every member or shareholder liable to the payment thereof; and if any member or shareholder fail to pay any call due from him on the day appointed for payment thereof, he shall be liable to pay interest for the same, at the rate of £25 per cent. per annum, from the day appointed for the payment thereof to the time of actual payment.

"45. After fourteen days' non-payment of any call in respect of any share, notice of the call shall be repeated, and after seven days' further non-payment thereof the board may sue the defaulting member or shareholder for the amount unpaid, with £25 per cent. per annum interest thereon from the day appointed for payment thereof.

"50. The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share; but any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture."

Mr. *Jessel*, Q.C., and Mr. *C. T. Simpson*, for Mr. *Stocken*, contended there was no evidence to shew that Mr. *Stocken* had received due notice of the call in accordance with clause 44; and further, that if he had received such notice the company had waived all claim to interest by forfeiting the shares. Clause 50 reserved to the company the right to recover arrears of calls, but not interest thereon; and, in any case, interest could not run subsequently to the forfeiture.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for the official liquidator, contended that due notice had been given of the call. If Mr. *Stocken* did not receive the notice the only effect would be, that interest would become payable from the time of receipt instead of from the time when the call became due. Forfeiture made no difference. By the articles of association the shareholders became liable for interest until the call was paid; by clause 50 the company retained the right, notwithstanding forfeiture, to recover from him whatever he might be liable to pay in respect of the calls, that is, the amount of the call, and interest thereon. At all events, forfeiture could not cancel the interest for the interval between the time when the call became payable and the forfeiture; the shareholder was already liable to pay that on his contract.

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Stocken's Case.

Lord Romilly, M.R. :—

I do not think any interest is payable. The meaning of the 44th clause is very obvious. If the shareholder does not pay his calls he is to pay interest at the rate of 25 per cent; but at the same time, on making the payment, he would be entitled to receive any dividend which had accrued in the meantime; and if that dividend exceeded 25 per cent. he would have something to receive.

Then, as to the forfeiture, the matter is very plain. The 50th clause is as follows: "The forfeiture shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share." Stopping there for one moment, that puts an end to all claims and demands of the shareholder in respect of the share. Then it proceeds, "and all other rights incident to the share;" that must mean rights of the company against the shareholder; for, if not, the shareholder might be liable to fresh calls. Then, seeing what the result of that would be, they put in a reservation: "but any member whose shares shall have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture." No interest is reserved, because there was no corresponding right to receive dividends. I am of opinion, therefore, that the interest was wholly put an end to. If the company wished to retain the interest, the clause should have specified it, as well as the calls.

Solicitors for Mr. *Stocken:* Messrs. *Brooksbank & Galland.*

Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, & Co.*

EVANS *v.* WOOD.

M. R.
1867
Nov. 8.

Company—Winding-up—Vendor and Purchaser—Shares—Contract—Privity—Practice of Stock Exchange—Non-registration of Transfer through accidental delay of Transferee—Specific Performance—Indemnity—Discretion of Directors.

A. sold to *N.*, a stock-jobber, and *B.* purchased from *N.*, five shares in a joint stock company. According to the practice of the *Stock Exchange*, *N.* gave to *A.* the name of *B.* as the purchaser; and a transfer of the shares from *A.* to *B.* was executed by *A.* and *B.*, and the purchase-money was paid by *B.* to *A.*; but *B.* was prevented by accidental absence from home from sending the transfer for registration until after the company had stopped payment. The company was wound up, and the liquidators registered all transfers left at the office before the company stopped payment, but refused to register the transfer from *A.* to *B.*, and *A.* was made a contributory, and paid a call on the shares:—

Held, that *A.* was entitled to a decree against *B.* for repayment of the call, and indemnity against future liability in respect of the shares.

Where directors of a company had a discretionary power of refusing to register transfers if they disapproved of the transferee, and a transfer, executed before, was not left for registration until after the commencement of the winding-up of the company:—

Held, that in the absence of evidence that the transferee was objectionable, it would be presumed that the directors would have registered the transfer.

3CP. 133,-6,
3Ch 391,-2
6Eq 153, 163
— 498,-9
500,-4
— 647, 653,-4
4Ch 6,8
4CP. 31,
— 39,40,41
9Eq 591,
10Eq 52
15Eq 45.
7HL 533.
22ChD

ON the 17th of April, 1866, the Defendant, through his brokers, *Williams & Son*, purchased from *Nickalls*, a stock-jobber, five shares in *Overend, Gurney, & Co.*, for £71 17*s.* 6*d.*, for the 27th of April. The shares were not delivered on the 27th of April, but on the 4th of May the Plaintiff, through his brokers, *Burnand & Co.*, sold five shares in the same company, of which he was the registered holder, to *Nickalls*, for the same sum for the 7th of May, and *Nickalls* gave *Burnand & Co.* the name of the Defendant as the purchaser of the shares. On the 7th of May a transfer (1) of the Plaintiff's shares to the Defendant, executed by the Plaintiff, together with the certificates for the shares, was delivered by *Burnand & Co.* to *Williams & Son,* who thereupon, in accordance with the rules of the *Stock Exchange,* paid the purchase-money (which they had received from the Defendant on the 27th of April) to *Burnand & Co.* On the same day they forwarded the transfer to the Defendant, who lived in the country, but he, being absent from home on business, did not receive it until after post hour on the evening of the 9th of May; he executed the transfer on the 11th, and returned it to *Williams & Son,* but they did not leave it at the company's office for registration, the company having stopped payment on the 10th. A petition for the winding-up of the company was presented on the 11th of May, a resolution for voluntary winding-up was passed on the 11th of June, and an order was made on the 22nd of June for the continuation of the voluntary winding-up under the supervision of the Court.

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(1) The following was the form of the transfer: "I, *Henry Evans*, of &c., in consideration of £71 17*s.* 6*d.* paid to me by *John Richard Wood*, of &c., do hereby bargain, sell, assign, and transfer to the said *J. R. Wood* five shares, Nos. 80,175 to 80,179, of and in the undertaking called *Overend, Gurney, & Co., Limited*, to hold unto the said *J. R. Wood*, his executors, administrators, and assigns, subject to the conditions on which I held the same immediately before the execution hereof, and I, the said *John Richard Wood*, do hereby agree to accept and take the said shares subject as aforesaid."

The articles of association of the company provided that no transfer should be registered until it had been executed by the transferor and transferee, and that the directors might refuse to register the transfer where the transferee was not approved by the board.

All transfers left at the company's office on or before the 10th of May, 1866, and all transfers received at the office by post from the country on the morning of the 11th of May, were registered by the liquidators.

In July, 1866, the transfer of the Plaintiff's shares was presented to the liquidators for registration, but they refused to register it. In August, 1866, the Plaintiff applied in the winding-up to have the register rectified, by substituting the Defendant's name for his own, as the holder for the five shares, but his application was refused.

The Plaintiff having been settled on the list of contributories in respect of the five shares, and compelled to pay a call of £10 per share, instituted this suit, praying for a declaration that the sale and transfer of the shares was a valid and complete sale in equity, and that the Defendant might be ordered to pay to the Plaintiff the call already paid by him, and to indemnify him against all calls and liability in respect of the shares.

The original bill alleged that the Plaintiff sold the shares to the Defendant without mentioning the intervention of *Nickalls*, and did not state that the Defendant had executed the transfer.

The Defendant demurred for want of equity, but the demurrer was overruled (1).

The Defendant, by his answer, submitted that he had entered into no contract with the Plaintiff for the purchase of the shares, and that *Nickalls*, if anybody, was the proper person to indemnify the Plaintiff; that if he did enter into a contract, it was conditional on the directors accepting and approving of him as a transferee, which they had not done, and which the liquidator had refused to do; and that the deed of transfer contained no covenant to indemnify the Plaintiff against calls or other liability.

The cause now came on upon motion for decree.

Mr. *Pearson*, Q.C., and Mr. *H. A. Giffard*, for the Plaintiff:—

According to the rules and practice of the *Stock Exchange* there was an agreement between the Plaintiff and Defendant for the sale and purchase of the shares, and if the Defendant had not

(1) The judgment of the Master of the Rolls on the demurrer was as follows:—I do not think that this is a case in which I ought to allow the demurrer. It appears to me that this is a perfectly *boná fide* sale of five shares in *Overend, Gurney, & Co.*, the sale to be completed on the 7th of May. On that day the sale is completed, the Plaintiff executes the deed of transfer, and it is delivered to the brokers of the Defendant, and by them it is delivered to the Defendant. He might have had his name registered on that day, if he got it in time, or on the following day, or on the day afterwards, which was the 9th of May. On the 10th of May, *Overend, Gurney, & Co.* stopped payment. The Plaintiff has not been able to get his name taken off the list of contributories, and he is liable to pay the calls, and the question is, whether the person to whom he sold is not liable to indemnify him. The case of *Walker* v. *Bartlett* (18 C. B. 845) expressly decides that at law he is liable, that there is an implied contract to indemnify the Plaintiff, as long as the Defendant is the owner of the shares, or as long as he has allowed the Plaintiff's name to remain upon the register. As there was only one day upon which to make the transfer, I shall assume that he had allowed the Plaintiff's name to remain on the register, and that he remained the owner of the shares. If he had sold them before the stoppage of the company he would have had the same right against some other person, but that would not relieve him from being liable to indemnify the Plaintiff. I think the case of *Wynne* v. *Price* (3 De G. & Sm. 310) is an express authority that he is liable to indemnify the Plaintiff, and I overrule the demurrer.

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executed the transfer, he would have been compelled by this Court to execute it, and indemnify the Plaintiff against calls: *Wynne* v. *Price* (1); *Shaw* v. *Fisher* (2); *Paine* v. *Hutchinson* (3); *à fortiori* the Defendant, having executed the transfer, is bound to indemnify the Plaintiff against the consequences of his omission to register it. The directors could not have refused to register the transfer without any reason: *Poole* v. *Middleton* (4), and in this case no reason existed, and it is clear that it would have been registered if it had been left at the office on or before the morning of the 11th of May. The fact that the delay was caused by the Defendant's accidental absence from home cannot relieve him from the consequences. In *Hawkins* v. *Maltby* (5), where a decree for specific performance was refused, the transfer had been executed in blank by the vendor, and had not been executed by the purchaser, and between the date of the contract and the time for completion of the sale, a call had been made materially diminishing the value of the shares. But at law, even when the shares have become worthless before the time for completion, the purchaser is bound by his contract: *Chapman* v. *Shepherd* (6).

Mr. *Woodhouse* (with him Mr. *Jessel*, Q.C.), for the Defendant:—

First: There has been no contract between these parties. If the purchaser of an estate re-sells it (whether for the same or a different price), there is no contract or privity between the vendor and the sub-purchaser; and the same rule of law applies to the purchase and sale of shares, whatever may be the practice of the *Stock Exchange*. The Plaintiff contracted to sell to *Nickalls*, and could not have been compelled to transfer the shares to the Defendant; on the other hand, *Nickalls*, with whom the Defendant contracted, might have sued the Defendant for specific performance: *Paine* v. *Hutchinson;* and the Defendant cannot be liable to both *Nickalls* and the Plaintiff.

Secondly: If there was a contract between the Plaintiff and

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(1) 3 De G. & Sm. 310.

(2) 5 D. M. & G. 596. 1 Jur N.S. 1055

(3) Law Rep. 3 Eq. 257.

(4) 29 Beav. 646; 7 Jur N.S. 1262.

(5) Law Rep. 4 Eq. 572; since heard on appeal, Dec. 6, 1867. affd 2 W R 12.

(6) Law Rep. 2 C. P. 228.

Defendant, the purchase-money having been paid, and the deed of transfer executed by both parties, the contract is executed, and the Plaintiff's right in equity cannot go beyond the terms of the deed, which contains no covenant by the Defendant for indemnity. The Plaintiff's remedy (if any) is to bring an action at law on an implied contract for indemnity, as in *Burnett* v. *Lynch* (1) and *Walker* v. *Bartlett* (2).

Thirdly: The contract (if any) was conditional upon the registration of the Defendant as owner of the shares. Without that he is not the legal owner, and cannot exercise the rights of a shareholder. It is said that the transfer would have been registered if it had been sent to the company's office before the 11th of May; but it was not the Defendant's fault that his business took him from home on the 8th and 9th of May; and, even if the transfer had been sent up, the directors might then have refused, as the liquidators have since refused, to register it. Where a transfer of shares is not complete at the commencement of the winding-up, the Court will not compel the transferee to complete it: *Emmerson's Case* (3); *Walker's Case* (4). In *Bermingham* v. *Sheridan* (5), where the contract was made before the winding up, but the official liquidator refused to register the transfer, the vendor's bill for specific performance and indemnity was dismissed.

LORD ROMILLY, M.R.:—

Although I agree with almost all the propositions stated by Mr. *Woodhouse*, I do not think that they are applicable to this case, or that I can help making a decree against the Defendant. In the first place, with respect to the contract: in the case of *Paine* v. *Hutchinson* (6) the Plaintiffs were dealers in stocks and shares, and not the persons to whom the shares originally belonged, but they entered into the contract as principals. In this case the stockbrokers have entered into the contract as agents for both parties; then a transfer is drawn up expressly from the Plaintiff, who executed it, to the Defendant, who also executed it; and accordingly, as between them, the transfer is complete.

(1) 5 B. & C. 589.
(2) 18 C. B. 815. 2 Jur. N.S. 643
(3) Law Rep. 1 Ch. 433. 12 Jur. N.S. 592
(4) Law Rep. 2 Eq. 554.
(5) 33 Beav. 660; 8 Jur. N.S. 415.
(6) Law Rep. 3 Eq. 257.

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It follows from that, if the decision of the Lord Justice *Knight Bruce* in *Wynne* v. *Price* (1) is correct, and if *Overend, Gurney, & Co.* were still going on, that it would be the duty of the Defendant to get his name entered upon the register. The Defendant says that is a duty which he would willingly perform; that he was willing to take the shares, and to take all steps necessary for that purpose. Mr. *Woodhouse* relied greatly upon the case of *Bermingham* v. *Sheridan* (2), where I held—and, I think, rightly held—that where it was impossible for a person to be put upon the register, the contract could not be carried into execution, because part of the contract was, that the name of the purchaser should be put upon the register, and that part could not be performed. But this case differs from that, for this reason, that the Defendant, not from any intentional misconduct on his part, but owing to his accidental absence from home, did not send up the transfer to be registered before the 11th of May, which if he had done it would have arrived in time, and would have been duly registered, at all events by the liquidators, who would have had authority to register it; but as it came up too late it could not be registered, and the liquidators had no power or authority to register it. Now, I can hardly call that laches, because a man cannot be blamed for being absent from home upon business for twenty-four hours; but still, if any evil consequences follow from that absence, they must fall upon himself. A Court of equity does not treat it as a case of laches, for which a man should be punished; but the question is, upon whom the injury occasioned by the absence is to fall? If the Defendant had been at home, the registration of the transfer would have been duly made; he was not at home, and the consequence is—whether his absence was accidental or intentional—that he cannot get any benefit from his own absence; but the parties must be put in the same situation as if he had been at home, and the delay had not taken place.

36L. 393 There is this also to be taken into consideration: The directors had an unqualified power to reject any transferee whom they did not choose to put upon the list of shareholders. I assume they might have exercised that discretion in this case if they had thought fit, but I cannot assume that they would have exercised it in the absence of any evidence on the subject. On the contrary, I shall assume they would have exercised their discretion properly, and that the proper exercise of that discretion was to admit this, which was a *bonâ fide* transfer, there being no evidence to induce the Court to suspect that there was anything wrong in the transfer, or that the directors would have had any hesitation in putting the Defendant upon the list of shareholders. The consequence is, that this is one of the cases in which equity will interfere where there is a contract between the parties which if it has not been executed has only not been executed by reason or in consequence of an accident on the part of the Defendant.

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(1) 3 De G. & Sm. 310.

(2) 33 Beav. 660, 8 Jur NS 415

I am of opinion that the case is settled by authority, and that there is an abundance of cases which shew that this Court will interfere, and that this is a case in which specific performance may be had, and that it is not necessary to refer it to a Court of law merely to give damages. I think, therefore, that the Plaintiff is entitled to a decree against the Defendant; and although I do not think the Defendant was to blame originally, yet as he has resisted the claim of the Plaintiff, which was, I think, a correct claim, I must make him pay the costs. Of course the Plaintiff must act in respect of the shares exactly as the Defendant may desire.

Solicitors for the Plaintiff: Messrs. *Young, Maples, Teesdale, & Nelson.*

Solicitor for the Defendant: Mr. *H. H. Lawrence.*

Minutes.—Declare that the Defendant is liable to pay to the Plaintiff all sums which have been properly paid by the Plaintiff in respect of calls made upon the five shares since the 7th of May, 1866, with interest at 4 per cent., and is also liable to pay to the Plaintiff the amount of all calls which have been made upon the said shares since the 7th of May, 1866, which have not been paid by the Plaintiff, with all interest which shall be due in respect of such calls at the date of the account hereafter directed, the Plaintiff undertaking to pay such amount and interest to the official liquidator of the company. Declare that the Defendant is liable to indemnify the Plaintiff against all calls which may hereafter be made on the said shares, and all interest thereon, and against all liability and loss which the Plaintiff has incurred since the 7th of May, 1866, or may hereafter incur in respect of the said shares, and against all liability, loss, costs, damages, and expenses which the Plaintiff has incurred, or may hereafter incur, by reason of his being settled on the list of contributories of *Overend, Gurney, & Co.*, in respect of the said shares.

Order that the Plaintiff do, in all things relating to the said shares, act as the Defendant shall reasonably direct, and as if the Plaintiff were a trustee for the Defendant of the shares. Tax the Plaintiff's costs of suit, including any costs he may have been put to in respect of his being settled on the list of contributories in respect of the said shares. Take an account of what, having regard to the declarations aforesaid, is due to the Plaintiff for principal and interest in respect of the calls. Order payment by the Defendant to the Plaintiff, within fourteen days after service of decree and Chief Clerk's certificate, of what shall be found due to the Plaintiff for principal and interest. Order the Defendant, at his own expense, to give the Plaintiff a good and effectual indemnity in respect of the said shares, and against all future calls and interest thereon, and all liability, loss, &c., which the Plaintiff, his heirs, executors, or administrators, may incur, sustain, or become liable to, in respect of his having been settled on the list of contributories in respect of the said shares, such indemnity to be settled by the Judge if the parties differ. Defendant to pay Plaintiff's costs. Liberty to apply.

BISHOP OF WINCHESTER *v.* MID-HANTS RAILWAY COMPANY.

V.-C. S.
1867
Nov. 6.

Railway Companies—Vendor, Purchaser, and Lessee—Parties—Specific Performance—Declaration of Lien.

Bill by unpaid vendors against two railway companies—the purchasers and their lessees—in possession of the land, for specific performance of the contract; for payment of the purchase-money; for an injunction against both companies; for a declaration of lien, and that it might be enforced by a sale; and that a receiver might be appointed of the rents and profits of the purchasers' estate.

The Court *held* that the lessees were properly made parties;

Decreed specific performance and payment of the purchase-money within three months;

Declared a lien as against both companies; and gave leave, in case the money should not be paid, to apply for an injunction, and for the appointment of a receiver to enforce the lien.

3 Ch. 293
7 Eq 412
8 Eq 655
5 Ch 416,-
11 Eq 574,

MOTION for decree. The Plaintiffs were the trustees of a charity, and the Defendants the *Mid-Hants* and the *London and South-Western Railway Companies.* In December, 1860, the first-named company gave notice to the Plaintiffs of their intention to take certain pieces of land for the purposes of their Act, and, by an agreement of the 18th of October, 1864, the company agreed to pay the sum of £1364 for the land, and £5 per cent. interest till paid, and the vendors agreed that the company should have immediate possession, and to execute a conveyance on payment of the purchase-money and interest, which it was agreed should be paid within six months after the opening of the railway for public traffic.

On the 17th of February, 1865, an agreement was made between the companies that the *South-Western Company* should work the line, and they entered into possession shortly afterwards, and the line was opened on the 1st of October, 1865, for public traffic. The purchase-money not having been paid, this suit was instituted in January, 1867, praying for specific performance of the agreement; for payment of the purchase-money with interest and certain costs; that the companies might be restrained from continuing in possession of the lands until the agreement should have been

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performed; that it might be declared that the Plaintiffs had a lien as unpaid vendors; that such lien might be enforced by a sale of the lands; that a receiver might be appointed of the rents, issues, and profits of the real and personal estate of the *Mid-Hants Company*; that damages might be awarded to the Plaintiffs in respect of the wrongful conduct of the *Mid-Hants Company*, and that that company might be ordered to pay the costs of the suit.

Mr. *Bacon*, Q.C., and Mr. *Deverell*, for the Plaintiffs, said all the facts were admitted; asked for a decree in the terms of the prayer, and referred to the case of *Walker* v. *Ware, Hadham, and Buntingford Railway Company* (1).

Mr. *Kekewich*, for the *Mid-Hants Company*, submitted that the Plaintiffs were entitled to a decree for specific performance, with costs, and that he would submit to, and nothing more. The case of *Pell* v. *Northampton and Banbury Junction Railway Company* (2) shewed that the Plaintiffs were not entitled to an injunction, but they might be entitled to have the money paid into Court. He would not object to their having a declaration of lien, but he should object to any decree for a sale. In *Betty* v. *London, Chatham, and Dover Railway Company* (May 31, 1867)(3) the Master of the Rolls refused to order a sale.

Mr. *Fry*, for the *South-Western Company*, contended that they had improperly been made parties to the suit; that no decree for an injunction could be made against them, and that if a vendor chose to let a company into possession, and allow them to open their railway for the use of the public, he lost his right to a sale. The *South-Western Company* leased the line; were in the position of an ordinary tenant; and were willing to pay the sum they had agreed to pay to the *Mid-Hants Company* into Court. He would admit that if a receiver could be appointed, or if a sale could be had, the *South-Western Company* would be necessary parties; but the cases cited shewed conclusively that neither could be done.

Mr. *Bacon*, in reply:—

Pell's Case was decided upon a motion for an injunction, and

(1) Law Rep. 1 Eq. 195, 12 Jur. N.S. 18

(2) Law Rep. 2 Ch. 100. 2 Jur. N.S. 597

(3) 24 W.R. 169

this case comes on upon motion for a decree for specific performance. In *Sedgwick* v. *Watford and Rickmansworth Railway Company* (March 7, 1867) (2) the Master of the Rolls made a decree for an immediate sale, and the decision in *Betty's Case* was no departure from that in *Sedgwick's Case. Cosens* v. *Bognor Railway Company* (1) was a landowner's suit against two companies for payment, or for an injunction, and the order on the appeal motion, affirming your Honour's decision, was, that the first-named company should pay the money, and in default that both companies should be restrained from using the land. This is a similar case, and I must ask for a decree in the terms of the prayer.

Sir John Stuart, V.C.:—

There seems to be nothing in the nature of the contract, nor in the situation of either the Plaintiffs or the Defendants, to induce the Court to depart from the ordinary rules as to the rights of a vendor in a suit for specific performance. The contract is admitted. The right to a decree for specific performance and for payment of the purchase-money is also admitted. The purchasers, being in possession, and having failed to pay the purchase-money, the vendors have, according to the usual course, a right to ask for an injunction to restrain the purchasers from using the land until they have paid for it; to a declaration of lien in order that they may recover the amount due, and for the appointment of a receiver of the rents, issues, and profits of the land which is the subject of contract. A sequestration of the whole of the profits of the company would not be according to the usual course of the Court.

It has been said, however, on behalf of both companies, that the situation of a vendor who sells to a railway company is different from that of other vendors. It is not disputed that he has a right to a declaration of lien, but his remedies for enforcing it are disputed. It is not denied that he has a remedy, but the particular remedy has not been pointed out, nor any case in that respect referred to.

Some of the cases which have been cited, at first sight countenance the notion that a railway company, being purchasers, are entitled,

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(1) Law Rep. 1 Ch. 594; 12 Jur. N.S. 738.

(2) 2 W.R. 95.

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though they have not paid their purchase-money, to deal with the land in a way which the Court would not permit an ordinary purchaser to do. But upon an accurate examination of the authorities they do not establish so extraordinary a doctrine. In the case of *Pell* v. *Northampton and Banbury Junction Railway Company* (1), one of the Lords Justices, upon an interlocutory application, said that if the company were destroying the property the Plaintiff might be entitled to an injunction. If it be only in the case of destruction of the land that the Court will interfere against a company who fail to pay their purchase-money, there must be a different law as to railway companies, and more favourable considerations towards them than towards other contracting parties. But it is not conceivable that any Judge would entertain notions of that kind. That case, however, came on upon an interlocutory application, and not upon a motion for a decree for specific performance; and no doubt counsel were justified in relying upon this as shewing that the Court will not interfere against a railway company to the same extent as against an ordinary purchaser. It is quite new to me to hear that any Act of Parliament has authorized any railway company to take and use land under a contract for purchase, with a view to their own profit and the convenience of the public, without performing their contract. One of the last things that the Court should countenance is, that a corporation or public company should be exempted from the performance of their contracts. The Plaintiffs have not been paid for the land which the *Mid-Hants Company* contracted to purchase, yet the purchasers are now using it for their own profit. In such a case the Court is bound to interfere for the benefit of vendors and against purchasers who conduct themselves in such a manner.

It appears, however, that the *South-Western Company* are concerned in the matter of this contract, for the bill alleges that by an agreement between the two companies they became lessees, and that they are in actual possession of the railway, and as the Plaintiffs ask for the performance of the contract with the *Mid-Hants Company*, for an injunction against both companies, and for a declaration of lien, it seems plain that the *South-Western Company* have been very properly brought before the Court. It was said that the *South Western Company* are in the situation of an ordinary tenant only, and that it is contrary to the course of the Court, where a vendor has parted with possession and not received his purchase-money, to bring before the Court the tenant to whom a demise has been made by the purchaser. Ordinarily, a person not being a party to the contract ought not to be brought before the Court. But it is otherwise where possession is sought by the bill, and the person in possession will be affected by the decree. Therefore the *South-Western Company* have been properly brought here.

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(1) Law Rep. 2 Ch. 100, 12 Jur NS 97.

It is necessary to consider the position of the *Mid-Hants Company* and the mode by which the Plaintiffs can best recover payment of their money. The *Mid-Hants Company* are without funds out of which to meet their engagements, and in that state of things—the Plaintiffs not having any decree for specific performance, and the company not having been ordered to pay the purchase-money to them—there must be a decree for specific performance and for payment of the purchase-money on or before this day three months. The next question is, whether, at this stage of the case, the Plaintiffs are entitled to a declaration of lien as unpaid vendors, and as against both companies; and it seems to me to be a matter of course that there should be such a declaration till the purchase-money has been paid. As to the prayer for an injunction, I will give the Plaintiffs leave, in case the purchase-money shall not be paid as ordered, to apply for an injunction, and for the appointment of a receiver for the purpose of enforcing their lien. The costs of the Plaintiffs must be paid by the *Mid-Hants Company*, and in the meantime will form part of the lien, and there will be no order as to the costs of the *South-Western Company*.

Solicitors for the Plaintiffs: Messrs. *Ridsdale & Craddock*, agents for Mr. *J. H. Todd, Winchester.*

Solicitor for the *Mid-Hants Company*: Mr. *G. T. Porter.*

Solicitors for the *South-Western Company*: Messrs. *Bircham & Co.*

V.-C. S.
1867
Nov. 7.

In re ACCIDENTAL AND MARINE INSURANCE CORPORATION.

Companies Act, 1862, s. 115—*Winding-up—Creditor of Company—Examination of Witness.*

[illegible]
Ch. D. 118.

A mere creditor of a company in liquidation, who is not shewn to be capable of giving the information referred to in the 115th section of the *Companies Act*, 1862, is not a person to be examined under that section.

A MOTION on behalf of the liquidator of the *Accidental and Marine Insurance Corporation*, that *Camillo Mercati* might stand committed for refusing to answer certain questions before the Special Examiner, or that he might be ordered to attend at his own expense on a day and at a place to be appointed, and there answer such questions, and such other questions as might be put "concerning the trade dealings, estate or effects of the said company," or in default might stand committed to prison.

Mercati claimed to be a creditor of the company for £10,000, in respect of a marine policy, and he brought an action against the company. A winding-up order was subsequently made. *Mercati* applied for leave to go on with his action, but his application was refused on the ground that the same question would be decided in another action pending against the company. Early in October, 1867, a summons was taken out by the liquidator requiring *Mercati* to attend as a witness on the 4th of that month before the Chief Clerk of the Vacation Judge, and he attended accordingly, but he was then directed to go before the Special Examiner, who had been appointed to examine generally. *Mercati* went before the Examiner, and answered some of the questions put to him, but refused to answer others, and hence this motion under the 115th section of the *Companies Act*, 1862.

Mr. *Bacon*, Q.C., and Mr. *J. N. Higgins*, for the motion:—

The proceeding by summons was regular in every respect: *In re English Joint Stock Bank* (1). A winding-up order *ipso facto* stops all actions against a company, and a special case is required

(1) Law Rep. 3 Eq. 203.

V.-C. S.
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In re ACCIDENTAL AND MARINE INSURANCE CORPORATION.

to be made before any person is allowed to proceed with his action. No order was made against *Mercati*, and nothing was done by the Court to impede his rights. *Mercati* claimed to be a creditor for £10,000, and it was the right and duty of the liquidator to have him examined under the 115th section of the Act, in order that he might see whether *Mercati* had claimed more than he ought to have done.

Mr. *Marten*, for Mr. *Mercati*, was not called upon.

SIR JOHN STUART, V.C.:—

Mr. *Mercati* was summoned as a witness although he had no relations and no transactions with the company, except in reference to a certain policy of insurance which he had effected. With the affairs of the company he had had nothing to do. The only matter between them was one of simple contract relating to the policy of insurance. The 115th section of the Act contemplates the necessity of the widest means being allowed for obtaining discovery for the purpose of justice being done under the winding-up, and the object of the Court always is, and ought to be, not in any degree to abridge the powers conferred by the Legislature. It was said that the summons was issued in conformity with the course of procedure followed by Vice-Chancellor *Wood* in the case of the *English Joint Stock Bank* (1). But the question in that case was, whether or not a person whose evidence was sought, was a person within the meaning of the 115th section, and whether the proper proceeding was by the ordinary course of subpœna, or by some other mode. The witness in that case had been acting as an agent of the company, and he was therefore, from his agency, acquainted with the affairs of the company. But is it possible to say that every person who claims to be a creditor is in the same situation as an agent, as to his knowledge of the trade dealings, estate, or effects of the company? The witness in the case before Vice-Chancellor *Wood* was clearly within the scope of the section. But, in my opinion, it is impossible to hold that a mere creditor is within the scope of it, and I think it is not shewn to be necessary or proper that Mr. *Mercati* should be examined. Before the

(1) Law Rep. 3 Eq. 203.

V.-C. S.
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Examiner, Mr. *Mercati* was asked questions respecting his claim, and he very properly refused to answer them, and the application now is, that he shall be committed for contempt. It is to be regretted that Mr. *Mercati* did not apply at Chambers to get rid of the summons. The only question is, whether the liquidator has a right to go on with the examination, and my opinion is that he has not. I shall now dismiss the summons, and thus get rid of all that has been done under it, and Mr. *Mercati's* and all the other costs must come out of the estate.

Solicitors for the Liquidator: Messrs. *Lewis, Munns, & Co.*
Solicitors for Mr. *Mercati:* Messrs. *Thomas & Hollams.*

WALKER *v.* BREWSTER.

V.-C.W.
1867
Nov. 4.

Injunction—Nuisance—Fireworks—Music—Noisy Crowds.

The collection of a crowd of noisy and disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainments is liable to an injunction; even though he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police.

Semble, that letting off rockets and establishing a powerful band of music which plays twice a week for several hours continuously within 100 yards of a dwelling-house, are nuisances which this Court will restrain.

6 Eq 557
4 Ch 338
11 Eq 348

THIS was a suit for the purpose of restraining the Defendant, the lessee of *Molineux House* and grounds, *Wolverhampton*, from holding in such grounds certain *fêtes* as advertised, or any other *fêtes* of a similar character, and from permitting the grounds to be used for displays of fireworks, or for public music or dancing, or for any other public entertainment whereby large numbers of idle persons might be drawn together in the immediate neighbourhood of Plaintiff's premises.

The Plaintiff was the owner in fee simple of a house and grounds, called *Waterloo House*, in the outskirts of *Wolverhampton*, and divided by a narrow pathway from the grounds of *Molineux House*, which occupy an area of about four acres.

Molineux House had been occupied for many years, until 1860, as a private residence, and afterwards by a Mr. *Tyrer* as a school, and in May, 1867, the premises were leased to the Defendant *Brewster*, the proprietor of a music-hall in *Wolverhampton*, for two years.

Brewster entered into possession, and shortly afterwards advertised and held in the grounds a monster *fête* on Whit Monday, the 10th of June. These Whitsun diversions, which were attended by great numbers of persons, were followed by *fêtes* of a similar character every Monday and Friday evening, with music, dancing, and fireworks (omitting the fireworks on Fridays). The Plaintiff's complaint was thus stated in his bill:—

"These *fêtes* also have brought together, and still continue to

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bring together, great crowds of persons, many of whom are of idle and dissolute habits, to the great annoyance of the Plaintiff and the inhabitants of his house. The bands of music play for nine or ten hours each Monday and Friday without cessation. Great numbers of boys climb on to the walls of the Plaintiff's grounds adjoining *Molineux House*, and destroy their privacy. The shoutings of the assembled people are loud and continuous, and almost beyond endurance. The reports from the fireworks are frequent and most annoying, and have so frightened the Plaintiff's horses in their stables as to cause them to break loose from their fastenings, and sustain serious injury. The rocket-sticks fall thickly on the roofs of the Plaintiff's house and outbuildings, and in the garden, breaking the glass of the green-houses and conservatories, and there is great fear of the buildings on the Plaintiff's grounds, especially his stables, being set on fire by the fireworks falling upon them. The whole effect of these *fêtes* is to destroy the peace and comfort of the Plaintiff and his family, and to render it impossible for the Plaintiff to continue to occupy his said house and premises unless the said *fêtes* be stopped. The said *fêtes* are, in fact, a most grievous nuisance, and if allowed to proceed, will destroy the possibility of the Plaintiff's house being used as a gentleman's residence, and depreciate the value of his estate by from £1000 to £2000."

The bill, which was filed on the 1st of July, was directed specially against three "monster *fêtes*" advertised for the 8th, 9th, and 10th of that month, during the fair week.

On the 4th of July the Plaintiff moved for an injunction. The Defendant had not then had time to answer Plaintiff's affidavits, and as the Plaintiff declined to give an undertaking to be answerable in damages, the question was ordered to stand over until the next seal.

On the 11th of July, upon an undertaking by the Defendant not to let off any fire-balloons, or ascending fireworks, or any fireworks the sparks from which could fall on Plaintiff's buildings, the motion was ordered to stand over until the hearing of the cause, with liberty to apply to expedite the same.

The cause now came on for hearing.

Evidence was given in support of the Plaintiff's case by several residents in the *Waterloo Road*, affirming the statements in the bill, and shewing that the neighbourhood of *Waterloo Road* had up to lately a quiet and retired character, with houses of a superior class, occupied by persons of standing and position, who had selected the locality by reason of its freedom from noise, crowd, and bustle. The witnesses all deposed to the noise and din from powerful brass bands playing continuously for several hours, and distinctly audible two and a half miles off, the distance of the band from the Plaintiff's house being variously stated, but certainly not exceeding 100 yards; to the danger from fire-balloons and rocket-sticks; and especially to the nuisance from the concourse of idle vagabonds on *fête* nights in the *Waterloo Road*, "as if a fair were being held," the state of things on such occasions being thus described:—

"The holding of these *fêtes* attracts a very large concourse of persons of the lowest class to congregate, both within the grounds and in the *Waterloo Road* outside, completely choking the said road, rendering it almost impassable to persons wishing and having occasion to pass, who have to crush their way through, and are exposed to great danger and insult. The repose of the neighbourhood is completely disturbed by the continuous din of music within the grounds, and the shouts, noise, and confusion, and the disgusting language employed by the rabble and mob so congregated together in passing to and from the entrance to the said grounds."

It was also stated by the Plaintiff's gardener, that on the mornings after *fêtes* he had frequently found rocket-sticks in the grounds of Plaintiff, and noticed that the glass roof and other parts of the green-houses had been broken. In reference to the annoyance from men and boys occupying Plaintiff's garden wall, the gardener stated that on the 8th of July, at 11 P.M., after the music had ceased, and the crowds were dispersing, three men mounted the wall, and remained there in defiance of him, until he went up and insisted on their leaving.

Evidence was adduced on behalf of the Defendant as to the respectable character of the entertainments, which had been attended by the mayor and several of the town council (who had expressed their approbation), and also by the borough members.

The chief constable of *Wolverhampton,* who resided in *Waterloo Road,* and had never felt any annoyance, had frequently attended the *fêtes,* and also received reports of them from his officers. In no instance had there been any disturbance, nor any case for inquiry before the magistrates originating there; and, in his opinion, the position of the lessees afforded the fullest guarantee that no improper characters would be admitted, nor any act of immorality allowed to take place there.

The two policemen stationed at the entrance for the purpose of excluding prostitutes and disorderly persons, stated that on the first only of these *fêtes* had any prostitutes applied for admission, and that on being refused they at once retired; that no disorderly or disreputable characters whatever had been admitted, and that the utmost order and decency of conduct and conversation had been maintained during the *fêtes.*

A Mr. *Sills,* residing in *Waterloo Road,* denied that any inconvenience to himself or family had arisen from the entertainments given by Defendant.

It was also stated that *fêtes* of a similar character had been held at intervals for the last ten or eleven years in *Molineux Grounds*—sometimes as many as three in a week—without any complaint on the part of the Plaintiff or any of the other residents in *Waterloo Road,* and, in particular, several *fêtes* had been given without objection during Mr. *Tyrer's* occupation of *Molineux House.* Only two of these *fêtes* had been held for purposes of charity, all the others having been at the risk and for the profit of the givers.

In reply to this evidence, the Plaintiff adduced the evidence of five persons, all residing in *Waterloo Road,* all of whom complained in very strong terms of the nuisance, and described the neighbourhood as having been quiet and peaceable down to the end of *Tyrer's* tenancy.

In reference to the *fêtes* held during his tenancy, *Tyrer,* who was a schoolmaster, stated that during his occupation of *Molineux House* and grounds between September, 1862, and the

25th of March, 1867, he was induced to allow the grounds to be used for *fêtes* on two occasions only, in both instances during his school vacation. One of these *fêtes* was on behalf of the *United Order of Foresters Friendly Society*, the other on behalf of the Widows and Orphans' Fund of the *Manchester Unity of Odd Fellows*, and the proceeds were divided amongst the charitable institutions of the town. *Tyrer* went on to state that although these *fêtes* were patronised by the borough members and many of the principal inhabitants, and to some extent conducted under the control and supervision of the clergy, and the authority of the police, "the attendant noise and confusion was a great nuisance to myself and neighbours, independently of which the scenes of vice and immorality which came under my personal observation in the evenings rendered such *fêtes* an abomination. Nothing would have induced me to have allowed a continuance thereof."

In reference to the evidence given by the chief constable and policemen, Plaintiff stated that although they might have prevented the well-known prostitutes and disorderly people from entering the said grounds from the *Waterloo Road* entrance, it was nevertheless a fact that great disorder and noise occurred during the holding of the said *fêtes*, and numbers of such characters assembled in the *Waterloo Road*, to the great annoyance of the inhabitants of the neighbourhood.

Mr. *Druce*, Q.C., and Mr. *Fry*, for the Plaintiff:—

Even allowing that these *fêtes* have been properly and morally conducted, they cause an assemblage of idle and dissolute persons near the spot outside, and that is a nuisance in the eye of the law, and one which this Court will interpose to restrain: *Rex* v. *Moore* (1); *Bostock* v. *North Staffordshire Railway Company* (2); *Crump* v. *Lambert* (3); *Hawkins*, Pleas of the Crown (4).

Mr. *Kay*, Q.C., and Mr. *Horsey*, for the Defendants:—

No specific disorderly act, nor anything at all approaching to a nuisance, has been established as the result of these *fêtes*. The

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(1) 3 B. & Ad. 184.
(2) 5 De G. & Sm. 584.
(3) Law Rep. 3 Eq. 409.
(4) B. 1, c. 75, ss. 6, 7.

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evidence shews that every possible care has been taken to conduct the entertainments in a respectable and orderly manner, and to exclude improper characters from the grounds. If the Defendant is to be made responsible for the assemblage of persons outside who come to listen to the music, and see the fireworks, the result will be that no ball or garden party can ever be given in *London*, or the outskirts, without rendering the giver of the party liable to an injunction, as people will always be attracted by music, and lights, and a string of carriages.

The cases cited do not apply. In *Bostock* v. *North Staffordshire Railway Company* (1) there was a direct trespass upon the Plaintiff's property, and interference with her right of fishing in the lake where the regatta was given by the Defendants, and, moreover, it was held that the Defendants being a public company, and having acquired the right of passage through the lake under their compulsory powers, must be restricted in their ownership to the purposes expressed in their Act. In *Rex* v. *Moore* (2) the grounds assigned by Lord *Tenterden* for the interference of the Court were specific acts of trespass, such as trampling down the grass, and destruction of fences, none of which are to be found in the present case.

Mr. *Molineux*, the lessor, who had been made a Defendant to the bill, and disclaimed any interest in the matter, was dismissed with costs, to be paid by the Plaintiff.

Sir W. Page Wood, V.C.:—

When this case was before me upon the motion for an interlocutory injunction, I was impressed with the defence of acquiescence which was raised against the Plaintiff. But when one comes to look into the matter, this defence breaks down altogether, as there is no evidence whatever of any single entertainment having been given for hire in these grounds during the last ten years. The only two which were allowed by Mr. *Tyrer*, the Plaintiff's predecessor during the four years immediately preceding the Plaintiff's tenancy, were for the benefit of charitable institutions, and the affidavit of Mr. *Tyrer* shewed that even these

(1) 5 De G. & Sm. 584.

(2) 3 B. & Ad. 184.

entertainments were so productive of annoyance that he never allowed any other *fête* to take place as long as he was the occupant of the property. What, then, is the nuisance complained of? Three things are alleged: First: The noise of a very powerful band of eighteen performers, which performs regularly twice a week, from two or three in the afternoon, until eleven at night. The second evil complained of is a serious one, the throwing up of rockets, to say nothing of the noise and glare of the fireworks, in the immediate neighbourhood of Plaintiff's premises, and the risk to his garden and greenhouses from the falling of the rocket sticks. The third nuisance complained of is exactly the case of *Rex* v. *Moore* (1), which stands upon grounds that are unimpeachable. The Plaintiff complains that when these *fêtes* are given crowds of idle people are drawn together who, being idle, do not pass on, but occupy the road and the Plaintiff's wall so as to obtain a view of the fireworks and other entertainments. On this part of the case no serious contradiction is to be found in the evidence. The chief constable of police and two of his officers have been brought forward, and state that the entertainments have been conducted in a most orderly and respectable manner, and that admittance has been refused to persons of improper characters. The Defendant, very much to his credit, seems to have been anxious to prevent anything like immorality, and stationed policemen at the entrance to keep out prostitutes and other improper characters. But the complaint of the Plaintiff is not against the persons who are actually in the grounds, but against those who have been shut out and had admission refused to them. In *Rex* v. *Moore* it was expressly stated that the Defendant had driven off the disorderly people from his own grounds in the same way as the Defendant here excludes them from these gardens; and yet it was held that the collection of these disorderly people outside amounted to a nuisance. It is to be observed that the chief constable, in his evidence as to the orderly character of the entertainments, does not allude to this main ground of complaint on the part of Plaintiff as to the conduct of the crowds collected outside, which is supported by evidence on behalf of the Plaintiff as to the annoyance produced by the block-

(1) 3 B. & Ad. 184.

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ing up of *Waterloo Road* by a crowd on the *fête* nights. Everything is, in fact, admitted on this head by the Defendant's witnesses. The policemen stationed at the entrances say that on one occasion some prostitutes had applied for admission, and that on being refused admittance they at once retired. Where did they retire to? It is only reasonable to suppose that they retired to the crowd from which they had come—that crowd which is complained of, and through which the people have to force their way. According to *Rex* v. *Moore* (1), which is in many ways a very instructive case, the thing is plain and clear. The very argument addressed to me by Mr. *Kay* was there mentioned. It was urged, that if the Defendant was to be held guilty of a nuisance by the collection of crowds outside who were not admitted to the grounds, and over whom he had no control, not a ball or rout could be given in *London* without rendering the entertainers liable for a nuisance. Mr. *Joy*, during his argument, referred to what was said by Lord *Ellenborough* in *Rex* v. *Cross* (2), "in allusion to the mention by counsel of the possibility of a hundred indictments every time a rout was given by a lady at the west end of town." He says Lord *Ellenborough* puts this question: "'Is there any doubt that if coaches, on the occasion of a rout, wait an unreasonable length of time in a public street and obstruct the transit of His Majesty's subjects, the persons who cause and permit such coaches so to wait are guilty of a nuisance?' By which he appears to have meant not that the lady herself ought to be indicted, but only such of her guests as blocked up the way by ordering their carriages to wait instead of drawing off and returning when wanted. They, of course, as obstructing the way by their equipages and servants, would be responsible, and not the person who invited them. And the present case is more favourable to the Defendant, for he did not even invite the persons who committed the nuisance."

It was also observed by Mr. *Joy*, during the same argument: "It does not follow that when a collection of idle people commit a nuisance the attraction which drew them together may not be perfectly innocent, otherwise the exhibition of prints in a window would render a printseller liable to an indictment wherever the footpath was obstructed by the number of gazers." In answer to this

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(1) 3 B. & Ad. 184.

(2) 3 Camp. 224.

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observation it was decided, in the case of *Carlile,* the printer, that the exhibition of prints in a shop window in *Fleet Street,* by causing the collection of a crowd, amounted to a nuisance. The truth is, that common sense must be used with reference to transactions of this kind. If persons use their houses for the enjoyment of life, and one of the ordinary enjoyments of life is supposed to be the occasional entertainment of one's friends at a rout, it would be very difficult for any one complaining of the noise and inconvenience caused by a rout to obtain an indictment at law, still more so, I apprehend, to persuade this Court to interfere. At all events, that differs altogether from a case like this, where the Defendant makes a business and a profit by giving entertainments, which are carried on so as to induce this crowd of idle people to collect in large numbers to the annoyance of the Plaintiff. In this respect the language of Lord *Tenterden* in *Rex* v. *Moore* (1) is exactly applicable to the present case: "The Defendant asks us to allow him to make a profit to the annoyance of all his neighbours. . . . If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable." There the nuisance complained of was the trampling of grass and destruction of fences. Here it assumes a much worse form, as persons cannot reach their houses without having to force their way through these crowds. Again, in the same case, *Littledale,* J., says: "It has been contended that to render the Defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object; but I do not agree with the other position, because if it be the probable consequence of his act he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result he will be answerable for it."

Mr. Justice *Taunton* refers to *Hawkins'* Pleas of the Crown, where it is laid down "that all common stages for rope dancers, and also all common gaming houses, are nuisances in the eye of the law . . . not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood." It appears to me, therefore, that a clear case of nuisance is established in the collecting of the crowd alone; and further, that I am not bound to specify the other nuisances to which this gentleman has been subjected. Having regard to the fact of this Court having restrained the ringing of bells (*Soltau* v. *De Held* (1)), I confess I have a strong opinion that the setting up a powerful brass band, which plays twice a week for several hours in the immediate vicinity of a gentleman's house, is a nuisance which this Court would restrain. I have a still clearer opinion that the noise of fireworks, as contrasted with the noise of the tolling of a bell, to say nothing of the damage that may be occasioned by falling rocket sticks, is a serious nuisance. But that the collection of crowds is a nuisance has been fully established; and in the neighbourhood of a populous town the letting off fireworks and performance of powerful bands will collect together crowds as a necessary and not merely a probable consequence. On this ground, therefore, the Plaintiff is entitled to relief, and there will be a perpetual injunction to restrain the Defendant *Brewster* from continuing to hold, and from permitting to be held, upon the grounds in the bill mentioned as being in his occupation, any public exhibition or other entertainment whereby a nuisance may be occasioned to the annoyance and injury of the Plaintiff.

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(1) 3 B. & Ad. 184.

Mr. *Druce*, suggested that in order to prevent the whole question from being left open, the decree should be prefaced by some declaration of the Court being of opinion that the nuisance complained of in the bill amounted to a nuisance.

The VICE-CHANCELLOR:—I have thought of that; but I prefer to leave the injunction in this general form. It seems quite enough if a nuisance has been established which is sufficient ground for an injunction. The band might be modified. It is difficult to fix the amount of annoyance that might be occasioned. You must prove the nuisance whenever you come to commit.

Solicitors: Messrs. *Sharp & Ullithorne*; Messrs. *Underhill & Field.*

(1) 2 Sim. (N.S.) 133.

MONTEFIORE *v.* ENTHOVEN.

V.-C. M.
1867
Nov. 4.

15 Eq. [illegible]

Forfeiture on Bankruptcy—Inspectorship Deed—Bankruptcy Act, 1861, s. 192.

A testator gave certain property to trustees to divide between his children, to transfer the shares of sons to them absolutely at twenty-one, and to pay the interest of the daughters' shares to them for life, and after the decease of each of his daughters, if she should leave a husband surviving, upon trust to pay the interest to her husband during his life, or until he should become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, and after the decease of such husband, or his bankruptcy or insolvency, then for the children of the marriage. And the will contained a proviso as to the sons' shares in certain residuary property, that in case either of them should, before his share became payable, assign, charge, or otherwise dispose of, the whole or any part of such share by way of anticipation, or become bankrupt, or take the benefit of any Act for the benefit of insolvent debtors, or do anything whereby such share should become vested in some other person, then the same was to go over. A daughter of the testator married and died, leaving a husband, who executed a deed of inspectorship under the *Bankruptcy Act*, 1861:—

Held, that the son-in-law had not brought himself within the clause of forfeiture, the meaning of which, as explained by the similar clause affecting the shares given to sons, was that such an act should be done as would cause a *cessio bonorum*.

THIS was a special case, the principal question being, whether the Defendant, *James Henry Enthoven*, had forfeited his interest under the will of his father-in-law, *Louis Lucas*, by executing a deed of inspectorship.

The testator, by his will, dated the 5th of June, 1844, devised and bequeathed the residue of his real and personal property to trustees upon trust to sell and divide the proceeds into as many equal shares as he should have children living at his decease who should attain twenty-one; and to transfer and assign the shares of sons as they should attain twenty-one, for their absolute use and benefit, and to pay the interest, dividends, and annual proceeds of the share of each of his daughters as and when she should attain the age of twenty-one years, or be married, and from thenceforward during her life, for her sole and separate use, notwithstanding coverture, and so that she should not be at liberty to anticipate, charge, incumber, or assign the same. And he directed the same share to be paid to each of his daughters respectively, free from the debts, control, or engagements of any husband with whom she might intermarry. And after the decease of such daughter respectively, if she should leave a husband her surviving, and whether there should or should not be any issue of her marriage, upon trust to pay the dividends, interest, and annual proceeds of the share to which such daughter so dying should have been entitled for life, unto her then husband during his life, or until he should become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, and after the decease of such husband, or his bankruptcy or insolvency, or immediately after the decease of such daughter respectively, in case she should not leave a husband her surviving, upon trust to transfer and assign the principal of the share to which such daughter was entitled for life, to such of her children as being a daughter or daughters should live to attain the age of twenty-one or be married, or being a son or sons, should live to attain the age of twenty-one, in equal proportions, and if any daughter should die without children who should become entitled to a vested interest in any such share, then after the decease, or the bankruptcy, or insolvency, of the husband or respective husbands of such daughters, in case she or they should leave a husband or husbands her surviving, and if not, then after her or their decease and failure of issue the trustees were to divide such share equally between the other children of the testator in manner therein mentioned. And the will contained a proviso with regard to certain property which was reversionary, that the share of each of his sons should be subject to this express condition, that in case he should at any time previously to the period when the same share would otherwise become actually payable to him, assign, charge, or otherwise dispose of, the whole or any part of such share by way of anticipation, or attempt or agree so to do, or become bankrupt, or take the benefit of any Insolvent Act, or do or suffer anything whereby the same share, or any part thereof, would become vested in some other person or persons, then he directed the interest of such shares to be applied for the maintenance and support of such son, and the persons who would be entitled to his share in case he were dead. The testator died in

July, 1851, leaving eight children, seven sons and one daughter, all of whom had attained twenty-one. The daughter, *Matilda*, married the Defendant, *James Henry Enthoven*, and died on the 24th of January, 1854, leaving her husband and one daughter, the infant Defendant, *Annie Enthoven*, her only issue her surviving.

On the 27th of December, 1866, *James Henry Enthoven*, who was then carrying on business as a merchant, together with *John* and *Frederick Enthoven*, under the firm of *J. H. Enthoven & Sons*, executed an inspectorship deed under the *Bankruptcy Act*, 1861, by which it was declared that the estate of the said *J. H. Enthoven & Sons* should be administered in accordance with the principles of the present bankrupt law in *England*, or as near thereto as circumstances would permit, having regard to the terms of the deed. And it was declared by such deed that until the debts of the firm should be paid all the moneys and proceeds of their estate should be applied, in like manner and to such an extent as under an adjudication in bankruptcy against the debtors, in paying all costs in carrying the same into effect, and in paying such debts as would be payable under the statutes in force relating to bankrupts in case the debtors had been adjudicated bankrupts. And it was further declared, that the said deed was intended to take effect as a valid deed of inspectorship within the provisions of the *Bankruptcy Act*, 1861. And, moreover, that the estate of the debtors was for the purpose of that deed intended, and should be construed, to extend to such estates and interests only as in the event of actual bankruptcy would pass to and become vested in the assignees or assignee thereunder for the benefit of creditors, and that such estates and interests (whether because bankruptcy would operate as a forfeiture thereof, or from any other cause whatever) as would not in the event of bankruptcy pass to and become vested in the assignees or assignee thereunder for the benefit of creditors, were not intended, and should not be deemed, to form part of, or be included in, the estate for the purposes of that deed, or be in anywise, or for any purpose, comprised in or affected by that deed, or in or by any recital, covenant, declaration, provision, or clause therein. The said indenture was duly executed by, or assented to by, a majority in number, representing three-fourths in value, of the creditors of the said debtors, and was duly registered in manner required by the 192nd and subsequent sections of the *Bankruptcy Act*, 1861, and then became binding upon all the joint and several creditors of the debtors, including *James Henry Enthoven*. The question in this case was, whether the Defendant, *James Henry Enthoven*, under the above circumstances, was now entitled, under the trusts of the will of *Louis Lucas*, to receive the income of the share of the testator's estate bequeathed by the will for the benefit of *Matilda Enthoven*, deceased, and her husband and children, or whether the trust of such income for his benefit had determined under the provisions of such will.

Mr. *Glasse*, Q.C., and Mr. *Everitt*, for the trustees, submitted the question to the Court:—

Mr. *Cole*, Q.C., and Mr. *Alexander*, for the infant child of *J. H. Enthoven* and the other Defendants interested in remainder:—

By the will of the testator, *Louis Lucas*, it is declared that the interest of a son-in-law should cease upon his becoming a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors. By executing the inspectorship deed, he has brought himself within the terms of this clause. He is not actually advertised as a bankrupt, but he avails himself of the machinery of the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), which is in all respects the same as becoming a bankrupt. The Act binds the creditors in the same way as they are bound by an actual bankruptcy, and it is provided by the 197th section that the creditors shall be subject to the jurisdiction of the Court of Bankruptcy as if the debtor had been adjudicated a bankrupt, and all questions arising upon the deed are to be decided according to the law and practice of bankruptcy. Mr. *Enthoven*, therefore, took the benefit of an Act for relief of insolvent debtors.

The will directs that the property is to go over, after the decease of a daughter's husband, "or his bankruptcy or insolvency," shewing that insolvency of any kind was sufficient to create a forfeiture or cesser of his interest, and that he was insolvent there can be no doubt. It was held in *Re Muggeridge's Trusts* (1); *Freeman* v. *Bowen* (2); and *De Tastet* v. *La Tavernier* (3), that a person who cannot pay his debts is insolvent. An insolvency has no technical

(1) Joh. 625. (2) 35 Beav. 17. (3) 1 Keen, 161.

6 Jur. N.S. 152

meaning further than the inability of a man to carry on his trade or answer his engagements.

Mr. *Cotton*, Q.C., and Mr. *Ferrers*, for Mr. *Enthoven* :—

The clause in this will is not intended to apply to simple insolvency, but to actual bankruptcy, or taking the benefit of an Act for relief of insolvent debtors. The repetition of the words "bankruptcy or insolvency" must have reference to the previous restriction. Consequently the cases cited do not affect this, as the words in those cases applied to insolvency of any kind. When this will was made a man could not take the benefit of any Act for the relief of insolvent debtors by executing a deed of inspectorship, the object of which is to avoid the consequences of bankruptcy. This deed expressly excludes the interest of the debtor in any property which would become forfeited by bankruptcy. If there had been such a bankruptcy or insolvency as existed at the time the testator made his will, this property would have passed to the assignees. The testator only contemplated an act which would have the effect of causing a *cessio bonorum*, and had no intention of punishing the person interested. His desire was to save the property from the creditors, and this is manifest from other portions of the will, particularly the clause in which he gives the sons their shares. In that clause he distinctly provides against their assigning or disposing of their shares, which sufficiently explains the meaning of becoming bankrupt, or taking the benefit of any Act for relief of insolvent debtors, which was the doing such an act as would cause a cessation of the property.

Mr. *Cole*, in reply.

SIR R. MALINS, V.C. :—

The testator in this cause, a gentleman of large fortune, makes a provision for his sons and daughters, which is directed to be divided into as many shares as the number of his sons and daughters. With regard to his daughter's share, he has directed that the interest of the share shall be paid to the daughter for life, and after her death, if she leave any husband surviving her, to the husband during his life, or until he should become bankrupt, or take the benefit of any Act for the relief of insolvent debtors; "and after the decease of such husband, or his bankruptcy, or insolvency, or immediately after the decease of such daughter respectively," then it shall go over to the children of the daughter. With regard to the sons' shares, they are directed to be transferred to them immediately, but a clause is inserted with regard to some part of the property which is reversionary, providing that if they should at any time before the shares became payable "assign, charge, or otherwise dispose of, the whole or any part of the same by way of anticipation, or attempt or agree so to do, or become bankrupt, or take the benefit of any Insolvent Act, or do or suffer any other act whereby the same share, or any part thereof, if payable to him, would become vested in some other person or persons," then in that case the property is to go over. Now, the event that has happened is, that Mr. *Enthoven*, the husband of the daughter, having survived his wife, has executed a deed of inspectorship, and that deed being executed under the *Bankruptcy Act*, 1861, and having been duly registered under the Act, he has acquired certain advantages from the execution of that deed, and has been to a certain extent protected from the demands of creditors who have not actually executed that deed. It is contended on behalf of the daughter, and those who, with the daughter, would be interested in the cessation of Mr. *Enthoven's* life estate, that inasmuch as the *Bankruptcy Act*, 1861, is the only Act by which insolvent persons can obtain relief, that Mr. *Enthoven* having executed a deed under the Act, has, within the words of the clause, taken the benefit of an Act for the relief of insolvent debtors. Now it is quite clear that by executing the inspectorship deed, and obtaining its registration, he has taken the benefit of an Act for the relief of insolvent debtors, because the Act of 1861 is an Act for the relief of insolvent debtors of all descriptions, whether traders or non-traders. But that does not conclude the question, because the question is, whether he has within the meaning of this will executed a deed under an Act for the relief of insolvent debtors? Now it must be borne in mind, that the will being made in 1844, and the testator having died soon afterwards, at that time taking the benefit of an Act for the relief of insolvent debtors, meant to do an act which caused a

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cessio bonorum, or a total deprivation of all the insolvent's property. The question is, whether this testator meant to provide against his property going over for the benefit of creditors, or whether he intended absolutely to prohibit those who took benefits under his will doing any act which should be a badge of insolvency. If the latter had been his object, he could have done it much more simply by saying, "if my sons-in-law or sons should become bankrupt or insolvent" (and undoubtedly this gentleman has become insolvent according to the definition of the word established by authority, because he has executed a deed by which he states that he, being a trader, is unable at present to pay his debts in full). If those had been the words, the property clearly would have gone over, not strictly by a forfeiture clause, for it is not a forfeiture clause; but it is the measure of the duration of his estate: it is during his life, or until he shall become bankrupt or insolvent. Therefore, the two cases cited, *Re Muggeridge's Trusts* (1), and *Freeman* v. *Bowen* (2), would have been conclusive that the execution of this deed was such an evidence of insolvency that a forfeiture must necessarily have taken place.

But this property is only to go over if he becomes bankrupt or takes the benefit of an Act for the relief of insolvent debtors. It is admitted he has not become bankrupt. Then has he, within the meaning of this will, taken the benefit of an Act for the relief of insolvent debtors? The clause giving property to the sons has been referred to. I think, having regard to that clause—assuming the testator used the same words with regard to the sons-in-law as he has with regard to the sons—what he says with regard to the sons is, they are to lose their property if they become bankrupt or do the very same act, namely, take the benefit of an Act for the relief of insolvent debtors. But other things are to cause a forfeiture with regard to them; if they shall "assign, charge, or otherwise dispose of, the whole or any part of the same by way of anticipation, or agree so to do, or become bankrupt, or take the benefit of any Insolvent Act, or do or suffer any other act whereby the same or any part thereof would become vested in some other person or persons." Now, therefore, taking that clause, it seems

(1) Joh. 625. 6 Jur. N.S. 192 (2) 35 Beav. 17.

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to me the object of this testator was to prevent alienation. He intends this as a personal provision. It is not to go over for the benefit of creditors; it is not to be assigned; and if the words had been applied to the sons-in-law which are applied to the sons, it is quite clear that no act done by Mr. *Enthoven* amounts to an assignment, or charge, or disposition of the property, or an agreement to do so; for he has neither assigned it, nor incumbered it, nor agreed to do so. If, therefore, instead of being a son-in-law of the testator he had been a son, none of the acts prohibited have been done, and there would have been no forfeiture, unless he had taken the benefit of an Act for the relief of insolvent debtors. It would be unjust, I think, in this case to put too rigid an interpretation on the language of this will, and to say that any act whatever by which one of the legatees obtains an indulgence of one month, or two months, or a year, from his creditors, is necessarily a forfeiture of this property. I think the testator must be considered as having in his view those two acts, namely, bankruptcy, and taking the benefit of an Act for the relief of insolvent debtors, which had the effect of depriving the bankrupt or insolvent debtor of his property, or, in other words, causing a *cessio bonorum*. The testator intended that his property should be for the personal enjoyment of the legatee, and not go over for the benefit of creditors. It may be hereafter, that Mr. *Enthoven* may do some act which would cause a forfeiture. But, looking at the whole frame of this will, and having regard to the rules of the Court, (for although this is not strictly a forfeiture clause yet it is in the nature of a forfeiture, and all forfeitures are strictly construed,) I think the testator must be considered as having had in view that mode of taking the benefit of the Act for the relief of insolvent debtors which would have caused a deprivation of the property. The act which has been done by Mr. *Enthoven* does not cause that deprivation, and I am of opinion that he has not forfeited his life estate. In a certain sense he has had the benefit of an Act, because he is by registration of the deed protected. But I think that was not in the contemplation of the testator, and it is only a fair interpretation of the will to say, as I have no doubt he would say if he were here to answer for himself, that he meant that mode of taking the benefit of an Act for the relief of insolvent debtors which would cause the legatee to lose the property.

I shall, therefore, declare that the execution of the deed of inspectorship has not caused any forfeiture or determination of the life estate of Mr. *Enthoven* in the share of the testator's estate to which he is entitled.

Solicitors for the Trustees and the Tenant for Life: Messrs. *Sampson, Samuel, & Emanuel.*

Solicitors for the other Parties: Messrs. *Maynard, Son, & Co.*

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Will—Power—Appointment to Objects of Power with superadded Restriction in excess of Power—Gift of other Property to Appointee—Election.

8 Eq 169, 171-2
9 Eq 304
14 Eq 539
8 Ch 423,
7 HL. 587
Ch D 437.
444,
2 ChD 557

A testator, in exercise of a special power, appointed a fund to his three daughters, who were objects of the power, their executors, administrators, and assigns, in equal shares, and he gave his residuary personal estate to the same daughters in equal shares, and he directed the share to which each daughter should become entitled under his will and the appointment to be held in trust for the daughter for life, with remainder for her children, who were not objects of the power:—

Held, that the daughters took absolute interests in the appointed fund, and that no case of election was raised against them in favour of their children.

Observations upon *Moriarty* v. *Martin* (1).

BY a settlement made in 1813 upon the marriage of Sir *Orford Gordon*, certain sums of stock were settled upon trust for Sir *O. Gordon* during the joint lives of himself and his wife, and for the survivor during his or her life, and after the death of the survivor upon trust for all and every, or such one or more exclusively, of the other or others of the child or children of the marriage, and, if more than one, in such shares, and with such provisions and limitations over for the benefit of such children, and upon such conditions, with such restrictions, and in such manner as Sir *O. Gordon* should by deed or will direct or appoint, and in default of such direction or appointment in trust for the children of the marriage in equal shares.

There were four children of the marriage: *William* (now Sir *William Gordon*), *Julia*, *Louisa*, and *Frances*. In 1839 *Julia* married *William Churchill*, and upon her marriage Sir *O. Gordon* gave her £10,000 consols, which were settled upon trust for the benefit of her and her husband and children.

Sir *O. Gordon*, by his will, dated the 11th of May, 1852, in exercise of the power given to him by the settlement, directed and appointed all the trust funds comprised in the settlement (subject to his wife's life interest) unto his three daughters by name, "share and share alike as tenants in common, and to their respective executors, administrators, and assigns." And he directed the share of each daughter to be subject to the same trusts for her sole and separate use, benefit, and disposal, notwithstanding coverture, as were thereinafter declared respecting her share in his residuary personal estate thereinafter bequeathed; and he bequeathed his residuary personal estate to trustees upon trust for his wife for life for the maintenance and support of herself and his children whilst they continued unmarried, and after her death, as to £10,000 consols, in trust for his son, and as to the residue upon trust to divide the same into three equal parts, and to stand possessed of one of such parts for each of his three daughters; and he directed that the value of the £10,000 consols settled by him on the marriage of Mrs. *Churchill* should be taken as part of her share in the trust funds thereinbefore "respectively appointed and bequeathed to her or for her benefit," and be accounted for accordingly; and he "directed" the share, and all other moneys to which each of his daughters should "become entitled under his will, or under any appointment therein contained," to be held by the trustees of his will upon trust to pay the income of each share unto the daughter entitled thereto for her life for her separate use, and from and after her death, as to the principal, upon trust for all and every, or any one or more exclusively, of the other or others of the children of such daughter as she should by will appoint, and in default of appointment for her children equally, to be vested in sons at twenty-one, in daughters at that age or marriage, and in case any of his daughters should leave no child who should attain a vested interest, then he "directed" the principal of such daughter's share to be in trust for her next of kin, according to the *Statute of Distributions.*

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(1) 3 Ir. Ch. 26.

Sir *O. Gordon* died in June, 1857. Mrs. *Churchill* died in August, 1857, and her husband took out administration to her estate. Lady *Gordon* died in August, 1866.

The value of the funds comprised in the marriage settlement was about £15,000, and the value of the residuary estate, after satisfying the legacy to Sir *W. Gordon,* was about £25,000.

This suit was instituted by the children of Mr. and Mrs. *Churchill* against Mr. *Churchill,* the two surviving daughters of Sir *O. Gordon,* Sir *W. Gordon,* and the trustees of the will and

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settlement, to obtain the opinion of the Court as to the construction of the will of Sir *O. Gordon.*

Mr. *Baggallay,* Q.C., and Mr. *Lewin,* for the Plaintiffs:—

We admit that under the will there is an appointment of the settled funds to the testator's three daughters absolutely, and that the superadded direction for the settlement of the shares of the daughters is, so far as it purports to benefit their children and next of kin, who are not objects of the power, simply void, and does not affect the previous valid appointment; but we contend that the daughters are put to their election, and must either give effect to the testator's intention to settle the appointed shares upon their children, or give up their life interests in the residuary estate as a compensation to their children for the interest which the testator intended the children to take in the appointed funds. The principle of election is, that a person taking the benefit of a will shall give effect to the whole intention of the testator, and it applies to the case of an appointment in excess of a power as much as to the case of a gift by the testator of property which does not belong to him: *Whistler* v. *Webster* (1); *Reid* v. *Reid* (2); *Tomkyns* v. *Blane* (3). Here the testator has clearly expressed his intention that persons who are not objects of the power shall take an interest in the appointed funds; in that part of the will in which he expressly exercises the power he refers to the trusts of his residuary estate, and in the subsequent part of the will he treats the appointed funds and residuary estate as a mixed fund, in the division of which the £10,000 consols settled on Mrs. *Churchill* are to be brought into hotchpot, and declares the trusts of the whole fund, using the words "I direct," in accordance with the language of the power. The authorities are conflicting. *Moriarty* v. *Martin* (4), which is approved of by Lord *St. Leonards* (5), is in favour of the Plaintiff's contention. Of the cases which will be relied on by the Defendants, in *Carver* v. *Bowles* (6) the testator used the words, "so far as I lawfully or equitably may or can," thereby clearly expressing an intention not to exceed the power. In *Blacket* v.

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(1) 2 Ves. J 367.
(2) 25 Beav. 469.
(3) 28 Ibid. 422.
(4) 3 Ir. Ch. 26.
(5) Powers, 8th Ed. p. 582.
(6) 2 Russ. & My. 301.

Lamb (1) the trust for the persons who were not objects of the power was precatory only; in *Stephens* v. *Gadsden* (2) the invalid trusts were void for remoteness; in *Woolridge* v. *Woolridge* (3) the Vice-Chancellor considered himself bound by the authorities, but *Moriarty* v. *Martin* (4) was not cited; in *King* v. *King* (5) it was unnecessary to decide this question, as a case of election was raised by an express clause of forfeiture.

If there is no election, in ascertaining the share of Mrs. *Churchill* in the appointed fund and residuary estate respectively the value of the £10,000 consols settled upon her marriage must be apportioned rateably between the two funds.

Mr. *Southgate*, Q.C., and Mr. *Fischer*, for the two surviving daughters of Sir *O. Gordon*, and Mr. *Fooks* for Mr. *Churchill*:—

It is clearly settled that where a will contains an absolute appointment to objects of a power, with a superadded direction cutting down the absolute interest of the appointees for the benefit of persons who are not objects of the power, the superadded direction will be disregarded for all purposes, and that if by the same will the donee of the power gives his own property to the appointees, no case of election is raised: *Carver* v. *Bowles* (6); *Kampf* v. *Jones* (7); *Ring* v. *Hardwick* (8); *Lassence* v. *Tierney* (9); *Gerrard* v. *Butler* (10); *Rücker* v. *Scholefield* (11); *Harvey* v. *Stracey* (12); *In re Lord Sondes' Will* (13); *Blacket* v. *Lamb* (14); *Stephens* v. *Gadsden* (15); *Woolridge* v. *Woolridge* (16); *King* v. *King* (17). In many of these cases, as here, the testator treated the appointed and residuary property as a mixed fund. *Moriarty* v. *Martin* (18), which is the only authority the other way, must be considered to be overruled by *King* v. *King* (19).

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(1) 14 Beav. 482.
(2) 20 Ibid. 463.
(3) Joh. 63.
(4) 3 Ir. Ch. 26.
(5) 15 Ibid. 479.
(6) 2 Russ. & My. 301.
(7) 2 Keen, 756.
(8) 2 Beav. 352.
(9) 1 Mac. & G. 551.
(10) 20 Beav. 541.
(11) 1 H. & M. 36; 9 Jur. N.S. 17
(12) 1 Drew. 73, 138.
(13) 2 Sm. & Giff. 416.
(14) 14 Beav. 482.
(15) 20 Ibid. 463.
(16) Joh. 63.
(17) 15 Ir. Ch. 479.
(18) 3 Ibid. 26.
(19) 15 Ir. Ch. 479.

Mr. *Freeling*, for Sir *W Gordon*.

Mr. *G. Lushington*, for the trustees.

Mr. *Baggallay*, in reply.

Dec. 6. LORD ROMILLY, M.R., after stating the facts and reading the material clauses of the will, continued :—

In ascertaining the effect of the clause which declares the trusts of the shares to which the testator's daughters should become entitled under his will or any appointment therein contained, I have, first, to consider how the matter would have stood if the property appointed had been the only property the testator had disposed of; and, secondly, how the case is affected by the gift of the residue contained in the will, which the testator could deal with as he thought fit. In the first case, if it had arisen, I am of opinion that the daughters would have taken the appointed fund absolutely in equal thirds, for as the first appointment to them is complete and absolute, and it is only in a subsequent part of the will that the testator seeks to impose a condition and restriction on the appointment first made, and as the subsequent condition and restriction are simply void, the original gift remains unaltered and unaffected by that, which has, in truth, no efficacy whatever. The principle in the construction of wills, viz., that the qualifying trust subsequently introduced operates only so far as it can take effect, and that the rest of the gift remains in the original objects as given to them, which is fully expounded in *Whittell* v. *Dudin* (1), and *Lassence* v. *Tierney* (2), and has been followed in many subsequent cases, has been held to apply to appointments under a power as well as to bequests and devises; if the first appointment gives the absolute interest to the appointee, and the subsequent superadded modification of it is void, the original appointment stands exactly as if the attempted modification were struck out of the will. This is so laid down in numerous cases, of which *Kampf* v. *Jones* (3), and *Harvey* v. *Stracey* (4), may be cited as instances, and it is, I think, the settled rule and principle of this Court.

(1) 2 Jac. & W. 279.

(2) 1 Mac. & G. 551.

(3) 2 Keen, 756.

(4) 1 Drew. 73, 138.

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The next question then arises, how far is this principle affected by the circumstance that the testator by his will gives other benefits to the person in whose favour he has exercised the power of appointment with invalid restrictions superadded. Does it raise a case of election in such person, who is both appointee and legatee or devisee, and must the will be read as if a condition were imported into it to the effect that the legatee or devisee can only take the bounty given to him upon condition that he gives effect to the invalid portion of the appointment attempted to be effected by the testator? I am of opinion that this question must be answered in exactly the same way in the case of a legacy as it would be in the case of an appointment. As regards an appointment, the cases have not been uniform, and the matter has been discussed much of late. In *Carver* v. *Bowles* (1), where this point had to be decided, Sir *John Leach* held that no case of election arose; but the applicability of that case to others is supposed to be much impaired unless the appointment be made in exactly the words to be found in that case. Accordingly, it seems to have been held by the Lord Chancellor of *Ireland* in *Moriarty* v. *Martin* (2), that the decision in *Carver* v. *Bowles* turned exclusively on the words which introduced the appointment by the testator, viz.: "so far as I lawfully or equitably may or can." I have considered this attentively, but I profess my inability to see how these words can alter the case, or why the will should have been construed differently if these words had been struck out; in other words, I am unable to see how the question of election can properly depend upon the testator expressing a doubt whether the disposition he desired to make was a legal and effective one; if the testator knew that it was doubtful why did he not couple the gift of the residue with a condition which would have compelled the legatee to give effect to his wishes? I have, as carefully as I could, reconsidered my decision in the case of *Blacket* v. *Lamb* (3), I have also read and considered the case of *Moriarty* v. *Martin*, and I must say that the result of so doing has induced me to concur with the observations made upon that case by Lord Chancellor *Brady* in the case of *King* v. *King* (4). I think that a very dangerous rule

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(1) 2 Russ. & My. 301.
(2) 3 Ir. Ch. 26.
(3) 14 Beav. 482.
(4) 15 Ir. Ch. 479.

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of construction would be introduced, and one which would lead to great difficulties and technicalities, if the Court were to hold that the construction of identically the same words in a will would be different if the testator in one case prefaced these words by saying that he made the bequest as far as he lawfully could or might, and omitted that preface in the other. It appears to me that these words are implied in every gift that a testator makes, and, in consequence of them, to alter the person who is to take, and raise a case of election by introducing with the gift of the residue a condition that the residuary legatee shall not take it unless he gives effect to a prior invalid appointment, seems to me an unauthorized and unwise innovation in construction. To make the efficacy of such a charge depend upon the mere expression of a doubt in the testator's mind as to the legality or validity of what he is attempting to do, would, in my opinion, be productive of great difficulty in the construction of wills, and lead to much litigation. The object of all judicial decisions ought to be to simplify rules of construction as much as possible. When a man, by will, executes a power vested in him by a prior instrument it is to be assumed that he intends to execute that power legally, and only so far as he can do so legally, and the expression in the will that such is his intention ought not, in my opinion, to vary the effect of it. Take the converse case: suppose the testator had expressly said, "I know that legally I cannot so exercise the power, but still I choose to do it," could the Court on such a statement engraft a condition compelling the legatee, who also took other bounties under the will, to give effect to that invalid appointment, or abandon the other gifts? I think not, and yet this would be a much stronger case than that suggested in *Moriarty* v. *Martin* (1); but I know of no case that is to that effect, or, indeed, proceeds upon any ground of that description, with the exception of *Moriarty* v. *Martin*. That case seems to me to stand alone; all the other authorities are against raising the question of election in such a case, and this is confirmed by the recent decision of Sir *W. P. Wood*, in *Woolridge* v. *Woolridge* (2), which is, in every material particular, the same as the case before me, and in which the Vice-Chancellor lays down the same principle.

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(1) 3 Ir. Ch. 26.

(2) Joh. 63.

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I shall, therefore, declare that the daughters took the appointed fund equally in thirds, as tenants in common, and that no question of election arose by reason of the disposition of the residue. As to the £10,000 consols advanced on Mrs. *Churchill's* marriage, that is clearly to be taken in part of her share, and must be apportioned between the share of the settlement fund and the share of the residue which come to her. The costs must come out of the residue.

Solicitors for the Plaintiffs: Messrs. *Hunter, Gwatkin, & Hunter.*

Solicitors for the Defendants: Messrs. *Mead & Daubeny*; Messrs. *Nicholl & Co.*; Messrs. *Farrer, Ouvry, & Farrer.*

GIBSON *v.* FISHER.

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Nov. 6, 12, 22.

Will—Gift to Descendants "per stirpes and not per capita."

escendants/

Bequest to the brothers and sisters of *A.* living at testator's death, "such descendants to take as tenants in common *per stirpes*, and not *per capita*":—

Held, that the fund was primarily divisible into as many equal shares as there were brothers and sisters of *A.* of whom any descendant was living at testator's death; that such shares respectively were divisible into as many equal shares as there were children of such brothers and sisters of *A.* respectively living at testator's death, or having died and left any descendant then living; that the same principle was to be applied to every sub-division, and that no descendant was entitled to any share concurrently with a living ancestor.

5 Ch D 22
988
11 Ch D 58
24 Ch D 6
666-7-8

The case of *Robinson* v. *Shepherd*, before Lord *Westbury* (1), not followed.

ABRAHAM FISHER, the testator in the cause, by his will, dated the 1st of September, 1863, gave the residue of his personal estate to trustees upon trust to pay certain legacies, and then as follows:—

"And pay all the rest, residue, and remainder of the moneys equally amongst the descendants of the brothers and sisters of the whole and half blood of my late father, *John Fisher*, who may be living at the time of my decease; such descendants of the brothers

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(1) 10 Jur. (N.S.) 53. 4 De G. J. & S. 129

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and sisters of my father to take severally as tenants in common, *per stirpes*, and not *per capita*."

The suit was instituted to have the trusts of the will carried into execution, and a decree was made and inquiries directed. The case now came before the Court on further consideration as to the rights of the parties who claimed to share in the residuary gift.

The testator's father, *John Fisher*, had four brothers and sisters of the whole and half-blood, namely, *Timothy Fisher*, *Joseph Fisher*, *Dinah Gibson*, and *Mary Birkett*, who all were dead at the date of the will, and had descendants living at the death of the testator.

Timothy Fisher had two children, namely, *Anthony Fisher*, who survived the testator, and died after the suit was instituted, leaving one daughter, *Ann Pike*; and *Mary Blenkinsop*, who pre-deceased the testator, leaving three children who survived him, namely, *Anthony Blenkinsop*, *Joseph Blenkinsop*, and *Grace Smith*.

Joseph Fisher left the following descendants living at the testator's death, namely, his granddaughter, *Charlotte Monteith*, and her seven children.

Dinah Gibson left only one daughter, *Grace Gibson*, who survived the testator, and was one of the Plaintiffs, but had since died.

Mary Birkett left five children who survived the testator, namely:—

(*a*) *Joseph Wilson* (one of the Plaintiffs), who had two children living at the testator's death;
(*b*) *Thomas Wilson* (one of the Plaintiffs);
(*c*) *Mary Wilson*, who had children living at the testator's death;
(*d*) *Elizabeth Wren*, who had four children living at the testator's death, namely:—
    Ann Wren, who had a son living at the testator's death;
    Joseph Wren;
    Martha Wren;
    Mary Wren, who had three children living at the testator's death.
(*e*) *Sarah Simpson*, who had children living at the testator's death.

The following were the principal contentions raised in the case:—

1. That all the families living at the death of the testator were entitled to share in the fund, without regard to their respective *stirpes;* that the fund was divisible into as many parts as there were such families, no child taking concurrently with a living ancestor; and that accordingly the fund was divisible into ninths.

2. That the fund was primarily divisible into fourths, there being four original *stirpes;* and that the descendants of each *stirps* were to take equal shares in the fourth originally belonging to that *stirps*, but so that descendants of a living ancestor were not to take concurrently with that ancestor, and descendants of a deceased ancestor were to take only by substitution.

3. That where there were children of a living ancestor, they were to take concurrently with that ancestor.

It was stated at the opening of the argument that the case was almost identical with *Robinson* v. *Shepherd* (1), which was heard on appeal by Lord *Westbury* (2), where the bequest was:—Among the lawful descendants living at the time of my death of the brothers and sisters of my grandfather, such descendants respectively to be entitled to share in a course of distribution *per stirpes*, and not *per capita.* It was there held that the property was divisible into as many shares as there were *stirpes*, or families, each *stirps*, or family, taking an equal share.

LORD ROMILLY, M.R.:—

At present I am disposed to think the decrees in this Court and on the appeal were both wrong; and that Lord *Westbury* did not, according to his written judgment, intend to make such a decree as that which has been drawn up. I therefore wish the whole case argued before me.

Mr. *Jessel*, Q.C., and Mr. *Lindley*, for the Plaintiffs:—

We contend that the residuary estate was primarily divisible into as many shares as there were brothers and sisters of the

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(1) 32 Beav. 665.

(2) 10 Jur. (N.S.) 53. 4 De G. J. S. 129

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testator's father who left descendants living at the testator's death—that is, into fourths—but that descendants of a living parent do not take in competition with that parent.

Sir *Roundell Palmer*, Q.C., and Mr. *Phear*, for Mrs. *Monteith* :—

The fund is divisible into fourths, to one of which Mrs. *Monteith* is entitled, to the exclusion of her children.

In construing this will, the use of the words "*per stirpes*, and not *per capita*" renders it necessary to look for the original root of descent, which is to be found in the four brothers and sisters. Then the words "*per stirpes*" must be taken to pervade the whole course of distribution, and to be carried on, *toties quoties*, when any new generation comes into existence. In order to ascertain the generations who are to take on the death of the testator, you must look to the heads of each line, and take the head in preference to the descendants.

The testator thought fit to designate the objects of his bounty by reference to their descent from deceased ancestors, the period of time when they were to be ascertained being the date of his own decease. When he directs that the line of descent shall commence from a certain *stirps*, or root, he points to that *stirps*, in the first instance, and you are to follow the same rule through every subordinate line of descent, the words being, in effect, repeated *toties quoties*.

In *Rowland* v. *Gorsuch* (1), under a direction in a will that the descendants or representatives of each of the testator's first cousins deceased should take in equal shares with those then alive, it was held that no person taking as representative could take otherwise than as the statute gave it to representatives, namely, *per stirpes*; and the residue was ordered to be divided among the first cousins living at the testator's death, and such of the descendants of those who died before him as were next of kin of the deceased first cousins and living at the testator's death. Your Lordship considered how far the *toties quoties* principle was applicable when the word "issue" was in question in the cases of *Ross* v. *Ross* (2) and *Robinson* v. *Sykes* (3). In the latter case, where, under a settlement,

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(1) 2 Cox, 187.

(2) 20 Beav. 645.

(3) 23 Beav. 40.

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a fund was divisible equally among the children of the marriage who should survive their parents, with a proviso that if any child should die in their lifetime, and leaving "issue" then living, his share should go equally between the issue of such child when the share of such child would, if living, have become payable—the "issue" of children were held to take *per stirpes,* and the successive generations by substitution; and your Lordship observed (1), "I am of opinion that the rule which I adopted in the case of *Ross* v. *Ross* (2) is that which is applicable to the present case, and where I, acting upon the principle that though the word "issue" is *nomen generalissimum,* and includes all the remotest descendants, nevertheless held that where issue are pointed out as persons to take with reference to the share of the parent, a gift which, so far as regards the parent, fails, they take on the principle which may be called a *quasi* representative principle, that is, that the children of each parent whose share fails take that parent's share, but not admitting the grandchildren to take in competition with the children, to participate in the share of the deceased parent." This shews that when the representative principle is let in you must go down from the original *stirps* in each case till you find the first head of each living generation. The same view was taken by the House of Lords in *Bullock* v. *Downes* (3); and under the words of this will the fullest extension must be given to the words "descendants of the brothers and sisters of my father."

The language attributed to Lord *Westbury* in *Robinson* v. *Shepherd* (4) does not, we submit, govern the present case. It is consistent with the rule laid down in *Pearson* v. *Stephen* (5), and in *Dick* v. *Lacy* (6), where the words "*per stirpes*" were held to import not only distribution, but succession, or some species of representation.

Mr. *Baggallay,* Q.C., and Mr. *Bedwell,* for Mrs. *Simpson*:—

We support the contention that the children of a living parent cannot take concurrently with that parent, but we contend that

(1) 23 Beav. 51. 2 Jur NS 537
(2) 20 Ibid. 645.
(3) 9 H. L. C. 1.
(4) 10 Jur. (N. S.) 53. 4 De G F & J. 129
(5) 5 Bli. (N. S.) 203.
(6) 8 Beav. 214.

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the fund was primarily divisible into ninths, and not into fourths. *Robinson* v. *Shepherd* (1) governs the present case.

Mr. *Southgate*, Q.C., and Mr. *Plummer*, for other parties in the same interest as Mrs. *Simpson*.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *Eddis*, for the children of Mrs. *Simpson* and Mrs. *Wren*, supported the contention that the fund was primarily divisible into ninths, but contended that the children of a living parent should take concurrently with their parent.

Mr. *Roxburgh*, Q.C., and Mr. *Dixon*, for persons in the same interest as Mrs. *Monteith*.

Mr. *Pearson*, Q.C., Mr. *Nalder*, and Mr. *Murray Browne*, for Mrs. *Pike* and Mrs. *Monteith's* children, contended that the fund was divisible into fourths in the first instance, and that children of living parents took concurrently with them, and referred to *Best* v. *Stonehewer* (2).

Mr. *Schomberg*, Q.C., Mr. *Karslake*, Q.C., the Hon. *E. Romilly*, and Mr. *F. Webb*, for other parties.

Nov. 11. Lord Romilly, M.R.:—

This case came before me on a very peculiar will, and it was with some reluctance that I dealt with it at all myself, but I thought that the better plan for the parties themselves was that I should do so. The words of the will are these:—[His Lordship then read the residuary gift.]

It is true that in the case before me of *Robinson* v. *Shepherd* (3), there was a bequest which was substantially the same, and which, I think, it is impossible to distinguish from the present. I there held that the *stirpes*, or the roots of the descent, were to be

(1) 10 Jur. (N. S.) 53. 4 DeG J & S 129
(2) 13 W. R. 566. 11 Jur N S 3 197. 16 Jur N S 140
(3) 32 Beav. 665.

taken, as the testator mentioned, from the brothers and sisters of his grandfather. That case was taken by appeal to the Lord Chancellor (Lord *Westbury*) (1). According to my decree, as drawn up, the branches being ascertained the descendants of each branch were to take as tenants in common. I am quite clear that that was wrong. Whether I so expressed it at the time I do not know, but I do not think it so appears by the observations I made at the hearing. The Lord Chancellor, according to his decree, seems to have come to the conclusion that you were not to look to the original *stirps*, but to as many *stirpes* as there were existing at the time of the testator's death, which seems inconsistent with the ordinary view taken by the Court of gifts of this description.

In that state of things I considered what I ought to do with this case. Unquestionably I must be bound by the decision of the Lord Chancellor, with this limitation, that if a decision of the Lord Chancellor were to be something opposed, in direct terms, to all the decisions of former Lord Chancellors on the same subject to be found in the books, the only inference would be, that there was some error or mistake in the matter, and, therefore, it would be necessary to see whether the decision were reconcilable with all the other decisions of equally high authority, for, if not, it would not be necessary for the Court to follow it. For instance, there was a case of *Cookney* v. *Anderson* (2), which was an application to serve parties with a subpœna in *Scotland* out of the jurisdiction, which went on appeal to Lord *Westbury*, and the Lord Chancellor affirmed the decision (3), but, in affirming it, he is reported to have laid down certain principles and rules by which it appeared that no service could be made at all out of the jurisdiction, and which have not since been followed.

I have looked very carefully at the Lord Chancellor's decree in *Robinson* v. *Shepherd* (1). Probably neither the Lord Chancellor nor I ever saw the decrees after they were drawn up and before they were passed and entered; but it is very difficult to say that either of them can be right as they stand. The result has been that, on the whole, I have thought, considering that there may be

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(1) 10 Jur. (N.S.) 53. 4 D. G. J. S. 137 (2) 31 Beav. 452: 8 Jur. N.S. 1221
(3) 1 D. J. & S. 365, 9 Jur. N.S. 736

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24 Ch D 668

an appeal from my decision by which the whole matter may be reviewed before a Court of competent jurisdiction, that it would be better that I should regard the case as if it were *res integra* without any previous decision in the case of *Robinson* v. *Shepherd*, and, so regarding it, I am of opinion that the whole residue must be divided *per stirpes* from the beginning, and that the rule of the *stirpes* must run through every descent, considering that "*per stirpes*" is an expression which means that all the persons who are to take are to take *per stirpes*, and that this must run through the whole range of the descents.

The words here are, "equally amongst the descendants of the brothers and sisters of the whole and half-blood of *John Fisher* who may be living at the time of my decease *per stirpes* and not *per capita*." I am of opinion it must be ascertained how many brothers and sisters of the whole and half-blood of the testator's father, *John Fisher*, had descendants who were living at the time of the testator's decease, and that the whole fund must be divided into as many portions as there were families descended from such brothers and sisters then living. The aliquot portion of each family being thus ascertained, the division must be carried on exactly in the same way as if that portion had been given to the descendants of that person *per stirpes* and not *per capita*, and so throughout the whole. I have looked at all the cases I can find on the subject, and they all appear to me to bear out that view of the case. This, as it appears to me to be, is the essential meaning of the words "*per stirpes*." Why are you to stop at any one place, when the testator directs that the descendants are to take *per stirpes*, and say that after that they are to take *per capita*? Or, on the other hand, why are you to say that the *stirpes* are to be ascertained at any particular period, instead of the period which the testator has mentioned?

That being the view I take, I will do what is sometimes convenient for the purpose of making my opinion clear, endeavour to state it in figures. Suppose a sum of £12,000 were given to the descendants of the brothers and sisters of my late father, *John*, and suppose there were four of those brothers and sisters, *A.*, *B.*, *C.*, and *D.*, then the fund would be divisible into four parts. I will leave out of consideration the shares of *B.*, *C.*, and *D.*, because they would all follow the same rule. Suppose that *A.* has died, leaving two sons, *E.* and *F.*; *A.*, if he had been alive, would have taken £3000, the fourth of the £12,000, but as he has died, leaving two sons, then they would take £1500 a-piece. Suppose, again, that *F.* were dead before the death of the testator, leaving three sons, then those three sons would have taken £1500 between them, or £500 a-piece, and if one of those two had died before the death of the testator, leaving five children, those five children would have taken their parent's share between them, and each would have taken £100 and so on, *toties quoties.* In that mode you would be working out all the way *per stirpes* as the testator directed, and not *per capita.* I will make a declaration to that effect in any form that may be thought most convenient.

Nov. 22. The case was again spoken to on minutes, and the decree was drawn up in the following form:—

Declare, that the testator's residuary estate became primarily divisible into as many equal shares as there were brothers and sisters of the whole and half-blood of the testator's father, *John Fisher*, who died before the testator, and of whom any descendant was living at the testator's death, and that each of such four shares became again divisible into as many equal shares as there were children of such brothers and sisters respectively living at the testator's death, or who had previously died, leaving any descendant who was then living; and that the above principle of division ought to be applied to every subdivision of every share, and that no descendant became entitled to any share concurrently with his or her ancestor. And declare that, according to the above principle, the testator's residuary estate became primarily divisible into four equal parts, and that one of such four parts became vested in *Grace Gibson*, and is payable to her legal personal representatives; and that one other of such fourth parts became vested in *Charlotte Monteith*, and that one other of such equal fourth-part shares became divisible into equal moieties, one of which became vested in *Anthony Fisher*, and is payable to his legal personal representatives, and the other became divisible into three equal parts, and that one of such third parts is vested in and payable to *Anthony Blenkinsop*, one other in *Grace Smith*, and the remaining third part in *Joseph Blenkinsop*; and that the remaining equal fourth part of the residuary estate became divisible into five equal parts, and that one of such fifth parts became vested in *Joseph Wilson*, another in *Thomas Wilson*, another in *Mary Wilson*, another in *Elizabeth Wren*, and another in *Sarah Simpson*.

Solicitors: Messrs. *Tatham & Proctor*, agents for Mr. *E. Waugh, Cockermouth*; Messrs. *Nethersole & Speechly*.

M. R.
1867
Nov. 5, 11.

DOLAN *v.* MACDERMOT.

Will, Construction of—Charitable Legacy—Gift for " Charities and other Public Purposes in the Parish of T."

21 Ch D 115

Bequest of pure personalty for "such charities and other public purposes as lawfully might be in the parish of *T.*" :—

Held, a good charitable gift.

affd by L C 3 Ch 676

THIS was the further consideration of a suit for the administration of the estate of *John Charles Macdermot,* late lord of the manor of *Tadmarton,* in the county of *Oxford;* who, by his will, dated the 22nd of September, 1863, devised his real estate, other than the said manor, and his personal estate (with certain specified exceptions) to trustees upon trusts for sale and conversion and investment; and upon trust to pay the income thereof to his wife, *Catherine Macdermot,* during her life for her separate use, and after her death to her sister, *Hannah Thornton,* during her life for her separate use; and after the decease of his wife, *Catherine,* and her sister, *Hannah Thornton,* in trust to lay out and bestow the said funds and estate "in such charities and other public purposes as lawfully might be in the parish of *Tadmarton,* in the county of *Oxford,*" as the trustees of that his will should, in the event of his leaving no specific directions by a codicil to that his will, in their discretion think fit.

The testator died without having made any codicil to his will. He was not entitled to any real estate, or estate savouring of the realty, except his interest in the manor of *Tadmarton,* and the question was, whether the residuary gift of his personalty in favour of charities was a good charitable bequest.

Mr. *Baggallay,* Q.C., and Mr. *Bagshawe,* for the Plaintiffs, trustees of the will.

Mr. *Jessel,* Q.C., and Mr. *Fischer,* for *Catherine Macdermot, Hannah Thornton,* and *John Charles Macdermot,* the only child of the testator :—

This gift being for "charities and other public purposes in the parish of *Tadmarton,*" is bad on two grounds; first, because it is for public purposes which are not charitable; and, secondly, because these purposes are simply defined to be in the parish and not for the benefit of it; and the gift is therefore too wide. The erection of a statue to the late Prince Consort in the parish would fall within the testator's words. In *Kendall* v. *Granger* (1) a gift for encouraging purposes of general utility was held to be void; so also in *Williams* v. *Kershaw* (2), a gift for "such benevolent, charitable, and religious purposes as my trustees may think fit," was held void. The only question is, whether a public purpose in a parish may not include a purpose not a charity; if it may, then, notwithstanding the discretion given to the trustees, the gift is bad. [They referred to *James* v. *Allen* (3); *Morice* v. *Bishop of Durham* (4); *Fowler* v. *Garlike* (5); *Vezey* v. *Jamson* (6); *Ellis* v. *Selby* (7).]

Mr. *Wickens*, for the Attorney-General:—

The legal meaning of the word "charitable" is different from the popular meaning. Many things are charitable in the legal sense which are not so in the popular sense; thus, a gift to government for the benefit and advantage of *Great Britain* has been held to be charitable: *Nightingale* v. *Goulbourn* (8). Here the testator uses the word "charities" in the popular sense; and by "public purposes" he means those which, though charitable in the legal sense, are not so in the popular sense. As to the gift being too wide, it is submitted that the fair meaning of the testator's words is "purposes for the benefit of the parish."

[He referred to the cases collected in the note to *Loscombe* v. *Wintringham* (9).]

Mr. *Fry*, for one of the trustees, who was a Defendant.

Nov. 11. Lord Romilly, M.R., after reading the will, continued:—

As the testator's property consists of pure personalty, the only question to be considered is, whether the objects of the charity are sufficiently defined, which resolves itself into this question:—What is the effect of the words "in the parish of *Tadmarton*, in the county of *Oxford*," upon this bequest? for there is no doubt that if it were given generally for such public purposes "as the said trustees shall in their discretion think fit," that would be too vague, and could not be carried into execution. That has been settled by *Morice* v. *Bishop of Durham* (1) and several other cases. Therefore if the word "parish" here is simply an expression of locality, that is, a description of the spot in which the public purposes shall or may be performed, the gift is bad. But if the place is connected with the gift of the charity itself in this way, that the public purposes must be for the benefit of the parish so specified, then it is good.

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(1) 5 Beav. 300.
(2) 5 Cl. & F. 111, note; 5 L. J. (Ch.) 84.
(3) 3 Mer. 17.
(4) 9 Ves. 399; 10 Ves. 522.
(5) 1 Russ. & My. 232.
(6) 1 S. & S. 69.
(7) 7 Sim. 352; 1 My. & Cr. 286.
(8) 2 Ph. 594.
(9) 13 Beav. 89.

I do not understand why "the parish of *Tadmarton*" is mentioned at all, unless the public purposes are meant to be for the benefit of that parish. It is suggested, for instance, that the testator might mean it to be given to the Chancellor of the Exchequer for the diminution of the national debt, but that would not perceptibly benefit the parish of *Tadmarton*. I am at a loss to understand what public purposes there are or can be in the parish of *Tadmarton* which have no connection at all with the parish itself. Of course, there might be public exhibitions, such as shows of wild beasts, in the parish of *Tadmarton*, but why should the testator wish to have them in that parish, and not in some place where they would be more likely to be seen and taken notice of?

I am bound also to take cognisance of the fact that it was the testator's own parish, because he describes himself in his will as belonging to that parish, and therefore there exists the probability of a disposition on his part to favour it.

The will makes a distinction between charities and public purposes, which appears to me to be a very common distinction. "Public purposes" are such as mending or repairing the roads of the parish, supplying water for the inhabitants of the parish, making or repairing bridges over any stream or any culvert that may be required in the parish; all these are "public purposes" in the ordinary sense of the term, and are distinguished from "charities, in the shape of almsgiving, building almshouses, founding hospitals, and the like, and which are more properly termed "charities." It is true that in a legal sense they are all charities, for they are all charities within the meaning of the statute of *Elizabeth*. Therefore, if the testator meant to promote public purposes for the benefit of the parish of *Tadmarton*, then they are charities which can be carried into execution, and which are sufficiently defined. Suppose, for instance, the testator had made the gift in this form, "I bequeath the whole of this sum of money, after the death of my wife and her sister, for such public purposes for the benefit of the parish of *Tadmarton* as my trustees shall think fit;" I apprehend nobody would say that the gift was bad, that is, one that could not be properly carried into execution, or that this Court could not execute.

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(1) 9 Ves. 399; 10 Ves. 522.

My opinion is, that such is the meaning of the words of the gift, and that there is no other meaning which can properly be given to them.

That being so, I am of opinion that it is a good bequest, and one that must be carried into execution.

Solicitors: Messrs. *Wilde, Rees, Humphry, & Wilde*; Messrs. *Bischoff, Coxe, & Bompas*; Messrs. *Raven & Bradley*.

HOPKINSON *v.* MARQUIS OF EXETER.

M. R.
1867
Dec. 18, 20.

Club—Expulsion of Member by General Meeting—Bonâ fide Exercise of Power to remove.

12 Eq 582
11 Ch D 35
14 Ch D 48
7 Ch D 621

The rules of the *Conservative Club* authorized the committee to call a general meeting "in case any circumstance should occur likely to endanger the welfare and good order of the club," and provided that any member might be removed by the votes of two-thirds of the persons present at such meeting. On a bill filed by a member so removed praying to be re-instated in his rights as a member of the club:—

Held, that, as in the judgment of the Court the meeting was fairly called and the decision arrived at *bonâ fide* and not through caprice, such decision was final, and that the Court had no jurisdiction to interfere.

THIS was a suit against the committee of the *Conservative Club*, of which the Plaintiff was one of the original members, and from which he had been expelled by the vote of a general meeting, praying a declaration that so long as he should conform to the rules of the club (which he offered to do) he was entitled to participate in the use and enjoyment of the property and effects of the club, and in its rights, privileges, and benefits, and also that the Defendants might be restrained from excluding the Plaintiff from such rights and benefits, and from removing his name from the list of members.

The rules of the club made no reference to the political opinions of its members, except so far as they were implied by the name. The 29th rule provided that it was "the duty of the committee, in case any circumstance should occur likely to endanger the welfare and good order of the club, to call a general meeting, and in the event of its being voted at that meeting by two-thirds of the persons present that the name of any member should be removed, he should cease to belong to the club."

At the time of the election in 1865 a correspondence took place between the Plaintiff and the secretary of the club respecting a pledge which it was alleged the Plaintiff had given to vote for certain "Liberal" candidates at the election of 1865, the result of which was that the committee convened a general meeting under the 29th rule to consider such correspondence, and whether the Plaintiff's name should be removed from the club.

The meeting was held, and the chairman referred to certain votes given by the Plaintiff for "Liberal" candidates, and the correspondence was read, after which the Plaintiff addressed the meeting, and expressed his wish that one of his letters to which exception had been taken were unwritten, and repudiated the right of the meeting to remove him.

A resolution that the Plaintiff should cease to be a member of the club was put to the vote and carried by 191 to 21.

The Plaintiff submitted that he had not been guilty of any conduct endangering the welfare and good order of the club; that the meeting was unauthorized; that the real issue put to the meeting was as to the votes he had given, which it was not competent to the meeting to consider.

The Defendants, by their answer, submitted that the meeting was properly convened; that the proceedings in question were not dictated by personal or political pique; and that the Plaintiff was not entitled to the relief prayed.

Sir *Roundell Palmer*, Q.C., Mr. *Wickens*, and Mr. *Osborne Morgan*, for the Plaintiff:—

A club being a species of partnership, the rules which regulate ordinary partnerships may, to a certain extent, be applied to it, though with some qualification, as it is an institution *sui generis*, being mainly intended for social purposes. All the members of a club are bound by the contract into which they enter, as defined by the rules. In the present instance there is a power by this contract under certain circumstances to remove a person from being a member of the club, but this power must be exercised *bonâ fide* and for the purpose for which it was introduced into the contract. The way in which similar powers are to be exercised in ordinary partnerships was considered in *Dummer* v. *Corporation of Chippenham* (1), and in *Blisset* v. *Daniel* (2), where it was held that a power which was given to two-thirds of the holders of shares in a partnership to expel any partner could not be exercised without any cause being assigned, but must be exercised with good faith and not against the tenor of the contract. In the case of *In re St. James's Club* (3), it was considered that though clubs were not partnerships within the meaning of the Winding-up Acts, yet that a member of a club had an interest in the general assets, and that if the club were broken up while he was a member he might file a bill to have its assets administered, and would be entitled to have a share in its effects. In the present case we contend that the power of removal was improperly exercised; that the real issue put to the meeting related to the Plaintiff's votes at the recent election, which did not contravene any of the rules of the club, and formed no ground for his expulsion; that this Court has, in such a case, full power to interfere, as in the case of an ordinary partnership, to protect the Plaintiff's rights and privileges as a member of the club; and that, there being nothing in his conduct to warrant the step which has been taken, he is entitled to a decree.

(1) 14 Ves. 245.

(2) 10 Hare, 493.

(3) 2 D. M. & G. 383.

M. R.
1867

Hopkinson v. Marquis of Exeter.

The *Solicitor-General* (Sir *C. J. Selwyn*), Mr. *Baggallay*, Q.C., and Mr. *Walford*, for the Defendants:—

A club is an association of gentlemen in which the rules of good order and good feeling ought to be maintained, and for this purpose the power of expelling an obnoxious member is vested in a certain majority of its members. We admit that this power cannot be exercised corruptly or capriciously, but if that is not proved to have been the case, the Court cannot interfere with the discretion of the members. The only question, therefore, is, whether they have acted *bonâ fide* for the good of the club. In *Inderwick* v. *Snell* (1), where a general meeting of a company was empowered by the deed of settlement to remove any director for negligence, misconduct in office, or any other reasonable cause, and certain directors were removed for alleged misconduct, and new directors appointed,—on a bill filed by the directors who had been removed to set aside the proceedings of the meeting, it was held that the words "reasonable cause" referred only to such a cause as should be deemed reasonable by the shareholders, and that, in the absence of fraud, the Court had no jurisdiction to interfere. That decision has been followed in this branch of the Court in the case of *Manby* v. *Gresham Life Assurance Society* (2). Here the Court has no right to interfere with the honest exercise of the discretion of the members. The circumstances of the case, and the Plaintiff's conduct, were sufficient to justify the calling of the meeting, and, with regard to the Plaintiff's votes at the election, if the majority held that those votes were contrary to the well-being of the club, even if that were the reason of the decision, it would afford no ground for the interference of the Court.

Mr. *Wickens*, in reply.

Lord Romilly, M.R.:—

I should have reserved my judgment in this case if I thought that by so doing I could have arrived at any different conclusion from that to which I was led very early in the argument.

14 Ch. D. 488 This is an application by the Plaintiff asking a declaration that

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(1) 2 Mac. & G. 216.

(2) 29 Beav. 439. 7 Jur N.S. 38

he is entitled to the enjoyment of the property and effects of the *Conservative Club,* and to participate in its rights, privileges, and benefits, and also that the Defendants, the committee of the club, may be restrained by injunction from excluding him therefrom, or removing his name from the list of members of the club.

These clubs are very peculiar institutions. They are societies of gentlemen who meet principally for social purposes, superadded to which there are often certain other purposes, sometimes of a literary nature, sometimes to promote political objects, as in the *Conservative* or the *Reform Club.* But the principal objects for which they are designed are social, the others are only secondary. It is, therefore, necessary that there should be a good understanding between all the members, and that nothing should occur that is likely to disturb the good feeling that ought to subsist between them.

It follows that a club is a partnership of a perfectly different kind from any other. In order to secure the principal object of the club, the members generally enter into a written contract in the form of rules, and in the rules of this club it is provided (Rule 29), that, "it shall be the duty of the committee, in case any circumstances should occur likely to endanger the welfare and good order of the club" (that is, likely in their opinion to do so), "to call a general meeting, and in the event of its being voted at that meeting by two-thirds of the persons present, to be decided by ballot, that the name of any member shall be removed from the club, then he shall cease to belong to the club." That rule amounts to this, that if such circumstances as are there referred to should arise, it would be the duty of the committee to call a meeting, and to submit the matter for the judicial decision of the members of the club at that meeting, and then it would be for them to determine whether any "circumstances likely to endanger the welfare and good order of the club" had taken place.

The evidence shews that this has occurred in the present case. The committee were of opinion that circumstances had occurred likely to endanger the welfare and good order of the club; they called a general meeting of the club. The matter was submitted for the judicial decision of the members of the club, and they decided by the votes of two-thirds of the members present, such votes being taken by ballot, that the Plaintiff should thenceforward cease to be a member of the club.

The first question is, whether there is any appeal from that decision. It is clear that every member has contracted to abide by that rule which gives an absolute discretion to two-thirds of the members present to expel any member. Such discretion, like that referred to by Lord *Eldon* in *White* v. *Damon* (1), must not be a capricious or arbitrary discretion. But if the decision has been arrived at *bonâ fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal. None but the members of the club can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce this Court to interfere.

In the present case I have felt reluctant to go into any questions that have arisen further than to ascertain that the decision of the meeting was a *bonâ fide* exercise of their discretion, and not the result of mere caprice. I forbear, therefore, to comment on the conduct or the letters of the Plaintiff, but I am of opinion that this was a *bonâ fide* meeting, and one that was fairly called; that the question was fairly submitted to the meeting, and the decision adopted *bonâ fide*, and not through any caprice; and, therefore, that the decision was final, and the bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Williams & James*.

Solicitors for the Defendants: Messrs. *F. & H. Walford*.

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(1) 7 Ves. 35.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN. *Ex parte* LEVICK AND OTHERS.

V.-C. S.
1867
Nov. 21.

17 Ls 268
270-2

Actions by Voluntary Liquidators—Execution by Defendant for Costs—Companies Act, 1862, ss. 87, 163.

Where an action brought by liquidators appointed in a voluntary winding-up under supervision fails, execution by the Defendant for costs will not be restrained.

The 163rd section of the *Companies Act*, 1862, is qualified by the 87th.

THE *Bank of Hindustan, China, and Japan, Limited*, being in voluntary liquidation, an order was made on the 21st of December, 1866, for continuing the winding-up under supervision. In February, 1867, actions were brought by the liquidators against Messrs. *Levick* and five other persons, which failed. On the 14th of August, 1867, judgments were entered up against the bank for the costs of the defence in the actions; and on the following day executions were issued. On the 16th of August, 1867, an injunction was granted by Vice-Chancellor *Malins*, restraining the Sheriffs of *London* and the Defendants in the actions from selling under the execution, and this was a motion that the injunction might be dissolved.

Mr. *Dickinson*, Q.C., and Mr. *Eddis*, for the motion:—

The only question is, whether these persons had a right to issue executions? The 163rd section of the *Companies Act*, 1862, which enacts, that where any company is being wound up by this Court, or subject to the supervision of the Court, "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents," does not apply to this case. This being a voluntary winding-up under supervision, the liquidators brought the actions, as they might do, without the leave of the Court (sect. 133, clause 7). The whole scope of the Act is to prevent creditors of the company from enforcing their demands at law; but it cannot be said that liquidators who, if they bring actions, and are successful, would be entitled to costs, shall not pay costs if they bring actions and are unsuccessful. If a summons had been taken out, and it had failed, the person against whom it was taken out would be entitled to costs. Supposing that the 163rd section does apply to this case, still the Court has the power of deciding whether the executions shall be proceeded with or not. The discretion of the Court has not been ousted by the clause. As there has been no irregularity in issuing the executions, the injunction ought to be discharged.

Mr. *Greene*, Q.C., and Mr. *J. N. Higgins*, for the liquidators:—

The whole of these proceedings have been since the winding-up. These judgment creditors for costs, like all other creditors, must come in and be paid *pari passu;* for the effect of the 163rd section is to make all executions after the winding-up void to all intents. In *In re Sablonière Hotel Company* (1), a creditor who signed judgment after notice of a voluntary winding-up was restrained from issuing execution, and there is no distinction between that and this case. No injustice would be done by following strictly the provisions of the enactment. The case of *In re Great Ship Company* (2) has no application to this case, because both the judgment and execution were obtained and issued before the winding-up. But in *In re Waterloo Life, &c. Insurance Company* (3), a creditor who obtained judgment on the day of the order for winding-up was restrained from issuing execution. These persons ought to go into Chambers, and raise there the question of priority. The policy of the Act is to put an end to all litigation after the order for winding up. The 163rd section is clear and explicit, and these executions, which were improper, are absolutely void.

SIR JOHN STUART, V.C.:—

No doubt the language of the 163rd section is without any qualification whatever. It imports an absolute nullity in any execution put in force against the estate or effects of a company after the order for winding up. But what extraordinary consequences would follow if that absolutely unqualified language should be considered as not being controlled by any other section of the Act. It seems to me that, as regards this case, the 87th section, which enacts that no action or other proceeding shall be proceeded with against the company except with the leave of the Court, and subject to such terms as the Court may impose, does control the operation of the 163rd section, for it is impossible to say, upon the true construction of the 87th section, that an execution is not a proceeding within it. This is a voluntary winding-up, and the liquidators have the power to do that which, under a compulsory winding-up they could not do without the leave of the Court: they may prosecute or defend any action. Official liquidators could not have prosecuted these actions without the leave of the Court. It was said that the great purpose of the Act, and of the 163rd section in particular, is, that complete justice shall be done between all the creditors of the company in paying them *pari passu*. That must mean creditors of the company at the time of the order for winding up. Now, although the official liquidators represent the company, their primary duty is a duty to the creditors, for by the proceedings of the liquidators the creditors are to be paid. In that view of the case, these actions by the liquidators were proceedings on behalf of the creditors. The liquidators, representing the creditors, endeavoured to increase the assets by these actions, but they failed, and the Court of law says that they ought to pay the costs; and I think so too. In the decision in the *Great Ship Company's Case* (1) there is not a word which interferes with the discretion of the Court to prevent a creditor or a person who has been unjustly sued from applying to this Court to do him justice, and to give him the costs awarded to him by a Court of law. As the 163rd section is controlled by the 87th to the extent that these are proceedings which may be taken against the estate or effects with the sanction of the Court, I must order that the injunction be dissolved with costs, to be paid out of the estate.

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(1) Law Rep. 3 Eq. 74.

(2) 10 Jur. (N.S.) 3. 4 De G. J. & S. 68.

(3) 31 Beav. 589. 9 Jur. N.S. 292

Solicitors for Messrs. *Levick* and others: Messrs. *Flux, Argles, & Rawlins.*

Solicitors for the Liquidators: Messrs. *Ashurst, Morris, & Co.*

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(1) 10 Jur. (N.S.) 3 4 DeG J&S. 63.

V. C. W.
1867
Nov. 13, 14.

BOYD *v.* SHORROCK.

Fixtures—Assignor and Assignee—Cotton Mill—Pegged Looms—Bills of Sale Act (17 *&* 18 *Vict. c.* 36).

4 Ex. 329
5 QB 135,
– 316
7 CP 332-4
340.
8 QB 292-3-4
8 Ch 1072-4
1076n. 1083,
1077n.
9 Ch 127
7 HL 485
487
4 Ch D 506
5 Ch D. 562-

Looms put up by the lessee of a cotton mill for his convenience during the existence of his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor, are, though easily moveable without injury to the freehold, fixtures which will pass under an assignment of "the mill, fixed machinery, and hereditaments, with all looms and other machinery, fixed or moveable," without the necessity of registering the assignment as an assignment of chattels under the *Bills of Sale Act* (17 & 18 Vict. c. 36).

Cunliffe & Piggott carried on business as cotton cloth manufacturers at *Blackburn*, and on the 17th of October, 1862, *Joseph Harrison* demised to them, for a term of eight years, all that plot of land in the lease described, and also all the power-loom, cloth-weaving shed or manufactory, boiler-house, and other erections and buildings erected upon the land (called *Havelock Mills*), together with the steam engines, steam boiler, shaftings, mill gearing, steam-pipes, and all other fixtures within, upon, attached, or belonging to the said plot of land. This lease contained a contract on the part of *Cunliffe & Piggott* to purchase the mill at certain prices therein mentioned, and a stipulation that they would not assign, demise, underlet, or part with the possession of the premises without the previous consent in writing of *Harrison*, to whom a power of re-entry was reserved in the event of bankruptcy, compromise with, or assignment for the benefit of creditors by *Cunliffe & Piggott*, or infringement of any of the covenants or stipulations of the lease.

Cunliffe & Piggott took an adjoining plot of land from *Harrison* upon similar terms, under a verbal agreement for a lease, and stocked the mill and weaving shed with looms and machinery, making considerable additions to the premises.

They were in the habit of sending the cloth as soon as it was manufactured to the Defendants, Messrs. *Shorrock & Co.*, of *Manchester*, for sale by them as agents: and the Defendants advanced them money for the purposes of their business, repaying themselves such advances out of the proceeds arising from the sale of the cloth.

On the 1st of February, 1865, *Cunliffe & Piggott* being indebted to *Shorrock & Co.* in the sum of £14,108 17*s.* 11*d.*, against which *Shorrock & Co.* held cloth of the estimated value of £3077, leaving an unsecured balance of £11,025, executed an indenture of this date, by which they granted and assigned to *Shorrock & Co.*, (1), the land comprised in a lease of the 29th of July, 1861: and, (2), all and singular the plot of land, mill, fixed machinery, and hereditaments comprised in the lease of the 17th of October, 1862 (from *Harrison*), together with all and singular the looms, and other machinery, whether fixed or moveable, then standing and being, or which at any time thereafter during the continuance of the security might be in and about such last-mentioned mill and premises, together also with full power for the said commission agents, or the survivors or survivor of them, their or his executors, administrators, or assigns, to enter and remain upon any premises belonging to the manufacturers, their executors or administrators, for the purpose of searching for, seizing, holding possession of, and selling to the best advantage, under the power of sale therein contained, any looms and machinery, not being then in and upon the last-mentioned mill and premises, and therefore not passing by the assignment thereinbefore contained, but which were, nevertheless, intended to be comprised in that indenture, together also with full benefit of the indenture of lease as a contract for sale by the lessors upon the terms therein contained.

This assignment was not registered as a bill of sale under the *Bills of Sale Act* (17 & 18 Vict. c. 36), although the Defendants' solicitor, by whom it was prepared, advised that, as it included the machinery, it ought to be. It was objected, however, by *Cunliffe & Piggott* that the registration as a bill of sale might affect their credit, and the objection was allowed. *Cunliffe & Piggott* stopped payment on the 30th of May, 1865, and were adjudicated bankrupts on the 22nd of June, 1865. On the 7th of July the Plaintiffs were appointed creditors' assignees.

The Defendants, Messrs. *Shorrock*, on the failure of *Cunliffe & Piggott*, claimed, in the first instance, the bulk of the machinery, but afterwards limited their claim, as regarded machinery, to 372 looms which were pegged down in the mill.

The bill was filed in March, 1866, by the assignees in bankruptcy of *Cunliffe & Piggott* alleging, (1), that the assignment of the 1st of February, 1865, comprising, as it did substantially, the whole of *Cunliffe & Piggott's* property, was an act of bankruptcy; and, (2), that the looms in *Havelock Mill* were chattels which, notwithstanding such assignment, became vested in the Plaintiffs as creditors' assignees of *Cunliffe & Piggott*, freed and discharged from all claims and demands of the Defendants; and praying relief upon this footing. The first point, as to the mortgage being an act of bankruptcy, having been abandoned by the Plaintiffs, the question upon which the discussion proceeded was whether the looms were chattels, or fixed to the freehold so as to pass by the assignment as against the assignees, notwithstanding the want of registration under the *Bills of Sale Act.*

It appeared that these looms were placed on a flag pavement within the mill, and worked by means of straps which connected them with the driving shaft of a steam engine. In order to keep them steady while being worked, a number of small holes about half an inch in diameter were cut in the pavement, and fitted with plugs of wood. Each loom was supported by four legs, each of which terminated in a broad flat piece of iron called the loom-foot, and each loom-foot, on the side of the loom opposite to that at which the strap was attached, had a small hole drilled through it of sufficient size to admit an ordinary nail to pass through the hole. The looms were then so placed that each hole in a loom-foot was directly above one of the plugs, and a nail was driven through the hole into the plug beneath it. The loom-feet at the end of the loom nearest the driving shaft were left free.

The Plaintiffs' case was, that this attachment of the loom-feet to the pavement was merely temporary, for the purpose of keeping the looms steady in working, and not in order to attach the looms permanently to the premises. If they were not thus pegged down they would be drawn along the ground towards the motive power to such an extent that the driving strap would become slack, or would not remain on the pulley, so that the looms could not be worked, while, on the other hand, the fastening could readily be detached (by an ordinary labourer in about one minute), and the looms were easily moved whenever it was desired to alter their arrangement; and, in fact, towards the end of 1864, more than 100 of these looms which had been thus pegged down were moved and placed closer together in order to give additional space at the further end of the mill.

Evidence was given on behalf of the Plaintiffs to the effect that, by the custom of trade in *Blackburn* and the neighbourhood, looms in cotton mills were not considered to be part of, or attached to the freehold of the mill, but as removeable property of the tenant, and that on a sale or valuation of a cotton mill and machinery, the land, buildings, engines, boilers, shafting gear, and gas, and steam-pipes, would be valued as the freehold of the mill, distinct and separate from the looms and other machinery, while it was considered essential that any assignment of looms which remained on the premises, or in the possession of the assignor, should be registered as a bill of sale. *Harrison*, the lessor, stated that he had not consented to the assignment; that on the 15th of July, 1865, he had re-entered under his power, and on taking possession had claimed the additions made by *Cunliffe & Piggott* to the buildings, and also the steam engines, shafting, mill gearing, gas and steam pipes, and all other fixtures attached to the freehold, but did not make any claim to the looms on the premises, considering them not to be attached to the freehold, but as the removeable property of the assignees in bankruptcy.

The case for the defence was, that these looms were affixed to the freehold, and that the attachment of the loom-feet to the pavement was not temporary only, nor made with the object merely of keeping the looms steady in working. From the manner in which they were fixed they could not be moved without forcibly drawing the nails from the wooden plugs which were driven into the soil below the flags, and their removal would injure the freehold of the mill, of which the looms, from the mode in which they were fixed, formed part. It was not disputed that throughout the district, as elsewhere, looms were treated as chattels which were capable of being fixed to the freehold, and which, when so fixed, passed with the freehold of the hereditaments to which they were fixed.

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Mr. *G. M. Giffard*, Q.C., and Mr. *C. T. Simpson*, for the Plaintiffs:—

The looms in question, all of which were placed in the mill by *Cunliffe & Piggott* during their tenancy, are not fixtures as between mortgagor and mortgagee, vendor and purchaser, or landlord and tenant; nor were they treated as such by the parties to the assignment of the 1st of February, 1865. Looms of this description are merely furniture of the mill, and not essentially a part of the building itself. Their attachment to the floor is merely temporary, for the purpose of steadying them, and they can be at once removed from one part of the mill to another by simply drawing the peg or nail. In *Hutchinson* v. *Kay* (1) moveable looms were held not to pass as fixtures, and the mere fixing by a nail or screw when the articles are not united to the fabric of the house by any permanent or substantial annexation will not make them fixtures, or determine the question whether the assignment must be registered under the *Bills of Sale Act* as an assignment of personal chattels. Carpets, chimney-glasses, and barometers, though all fastened by nails, are not fixtures, while, on the other hand, statues and vases, though not fixed, or cemented to the walls or balustrades on which they rest, have been held to be fixtures: *D'Eyncourt* v. *Gregory* (2). In this case we adduce evidence that, according to the ordinary custom of the district, looms placed in the mill by the lessee are part of the furniture of the mill, and regarded in valuations as purely personal chattels.

[The VICE-CHANCELLOR:—I must look at the language of the deed only for the purpose of determining the question, and I cannot admit evidence of any custom in the district for the purpose of giving a larger or more restricted sense to the thing assigned.]

The language used by the framers of the deed shews that in their estimation these looms were not affixed to the freehold, but merely chattels, and that it was not intended to pass them as fixtures. Suppose there had been a grant by the freeholder of "the land and mills erected thereon," would the freeholder have derogated from his grant by removing looms of this description from the mill. [They also cited *Haley* v. *Hammersley* (1); *Mather* v. *Fraser* (2).]

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(1) 23 Beav. 413. 3 Jur N S 652

(2) Law Rep. 3 Eq. 382.

[The VICE-CHANCELLOR referred to *Ex parte Barclay* (3).]

Mr. *Druce*, Q.C., and Mr. *Hamilton Humphreys*, for the Defendant:—

These looms are fixtures, which passed by the conveyance of the land, and the *Bills of Sale Act* (17 & 18 Vict. c. 36), which says, that where a person makes an assignment of any part of his chattels, including fixtures, the assignment or bill of sale must be registered in a particular way, does not apply: *Ex parte Barclay*; *Mather* v. *Fraser*.

The clear object of the parties to the deed was, that the looms should pass, and they will not the less pass from the circumstance that the parties, being uncertain whether they would pass with the land as fixtures, have, for the sake of caution, superadded words passing them as chattels.

In *Hutchinson* v. *Kay* (4) the legs of the looms were placed, without any fastening, in cups, which were merely dropped into the holes made, but not fixed in the flooring, so that there was no actual fixing to the soil by nails or screws, which was the distinction taken by the Master of the Rolls in *Metropolitan Counties Society* v. *Brown* (5), where even an anvil, though not actually fixed, was held to be a fixture from its being essential to, and forming part of, a fixed steam hammer, adopting the principle laid down by your Honour in *Mather* v. *Fraser* (6). In this case it would be impossible to remove the loom without wrenching out the nail which passed through the plugs and disturbing the actual soil. [They also cited *Cullwick* v. *Swindell* (7).]

Mr. *Giffard*, in reply.

SIR W. PAGE WOOD, V.C.:—

On the best consideration I can give to this case, having looked into the various authorities referred to, I can come to no other

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(1) 3 D. F. & J. 587. 7 Jur NS 765
(2) 2 K. & J. 536. 2 Jur NS 900
(3) 5 D. M. & G. 403, 410. 1 Jur NS 1145
(4) 23 Beav. 413. 3 Jur NS 652
(5) 26 Ibid. 454. 5 Jur NS 378
(6) 2 K. & J. 559. 2 Jur NS 904
(7) Law Rep. 3 Eq. 249. 1 Jur

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conclusion than that the principle enunciated in *Ex parte Barclay* (1) is the right one. That principle, which I followed in *Mather* v. *Fraser* (2), seems to be, that if the tenant has affixed to the freehold, during his tenancy, articles in such a manner as to make it appear that during the term they are not to be removed, and that he regards them as attached to the property, according to his interest in the property, then, on any dealing by him with the property to which these articles are affixed, the Court would presume that he meant to deal with the property as it stood, with all these things so attached, and to pass the property in its then condition. Now the intention in this case clearly was, that everything should pass. These particular things are mentioned, but that is not the immediate contest before me. In what character do they pass? Were they intended to pass as fixtures which were attached to the property during the tenant's interest in the property, or were they assigned as chattels as to which no such intention (of attaching them) can be found to exist? The intention of the deed was to assign, in the first place, all the landlord's fixtures, and then other fixtures of some sort; the language used being, "the looms and other machinery, whether fixed or moveable." Of course, as to all the chattels which are not fixed, they would simply pass in the ordinary way, as chattels, by way of assignment, in the nature of a bill of sale, which would require registration.

As to all the chattels which were affixed in the same way as in *Ex parte Barclay*, it appears to me that they were intended to pass, and did pass, with the property. The question is, whether or not the chattels were intended to be affixed during the tenant's interest, and whether he passed his interest in the property as it existed. The mortgage was not intended to be raised by sale of the fixtures, and there could be no power in the mortgagor of removing them during the time the mortgage existed; they must continue in the mill, and in that sense they must be affixed to the mill.

These cases, of course, have their own peculiar difficulties, but the definition, as far as it goes, given in *Ex parte Barclay* (3) really concludes the case: "By 'fixtures' we understand such

(1) 5 D. M. & G. 403. 1 Jur NS 1145 (2) 2 K. & J. 536. 2 Jur NS 900
(3) 5 D. M. & G. 410. 1 Jur NS 1146

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things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold, such will be machinery, using a generic term; and in houses, grates, cupboards, and other like things."

They are those things which an occupier has put up for his own convenience, and has also, for his own convenience, during the term, or during the existence of his interest, attached to the property which he holds. In the case of a carpet, it would be absurd to call that attached or fixed which, for the tenant's convenience, is removeable, and is repeatedly removed, independently of the existence of the term, and without the least notion that the thing is then and there attached for the purpose of being so enjoyed during the continuance of the tenant's interest. We know that a carpet is frequently removed every year, and probably is rolled up and carried away. It is impossible to call that a fixture. Now, although it appears that these looms are occasionally moved, they are placed in the places where they are intended to be used. As to the mode of fixing them, a solid piece of wood is, in the first instance, driven into the stone floor. That wood is not ordinarily moveable. When the floor is so prepared with these pieces of wood fixed into it, nails are driven through two of the feet of the loom. After passing through the wood the nails pass into the soil below the wood; and there remains the thing so fixed, and it would so remain during the continuance of the term, unless for some extraordinary purpose or other it was desirable that a re-arrangement of the place should be effected. The looms, no doubt, might be transported to another part of the building, and in that respect the case may be compared to a man dealing with a grate or cupboard. He thinks the cupboard would be in a more convenient situation if removed to another part of the building. Of course he can take down his cupboard, and screw it up in another part. Having done so, it is to be supposed that the cupboard continues where it is placed during the remainder of the term as a fixture. The primary intention, I apprehend, in this case is, that these looms shall be considered as fixtures during the time that *Cunliffe & Piggott* retain an interest in the term, The case of *Hutchinson* v. *Kay* (1)

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(1) 23 Beav. 413; 3 Jur N S 652,

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is distinguishable from the present. There the looms seem to have been put down in a more temporary manner. The feet of the loom were placed in a sort of cup or receptacle made for that purpose, and stood loose in the cup, so that there was nothing to do but to take the looms off, and there remained the cups, and the looms were removeable.

But then it is said that there is a custom in this trade that all these looms are regarded as not being fixtures, and I am asked to give credit to the evidence upon the subject. No such custom however, I apprehend, can be produced in evidence to alter the meaning of the words of the deed, those words being that the mill shall be assigned, with all its machinery fixed and moveable. It appears to me that the parties must be bound by what has been done, and if I come to the conclusion that they have fixed those things for the term, and have treated them as so fixed, and not as things to be transported from one place to another, the case is at an end. The circumstance that they may be transported sometimes, so that they may be placed more conveniently in another part of the building, does not, I think, prevent their being machinery within the decision in *Ex parte Barclay* (1), which I followed in *Mather* v. *Fraser* (2). I must hold that these are fixtures which passed with the property, and, therefore, did not require a bill of sale.

The caution given by the solicitor engaged in the transaction in advising that the deed should be registered as a bill of sale, was very proper, but it appears to me that the Defendants were right in holding that, so far as these looms were concerned, the transaction was not of that character which would necessarily compel them to do that which the mortgagor requested them not to do. No question of fraudulent preference arises. It is simply a question as to the construction of the deed, and I think the construction is with the Defendants. The bill will, therefore, be dismissed with costs.

Solicitors: Messrs. *N. C. & C. Milne*, for *Bateson Wood, Manchester*; Messrs. *Johnson & Weatheralls*, for *Higson & Son, Manchester.*

(1) 5 D. M. & G. 403. 1 Jur. N.S. 1145 (2) 2 K. & J. 536. 2 Jur. N.S. 900

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15 Eq. 118

Patent—Measure of Damages for Infringement.

A patentee of an invention applicable to part of a machine who, himself a manufacturer, has been in the habit of licensing the use of his invention by other manufacturers on payment of a fixed royalty for each machine, having obtained against an infringing manufacturer a decree (amongst other things) for damages, "by reason of the user or vending" of the invention, is not entitled to claim, by way of damages, any sum beyond the ordinary royalty.

Hence he is not entitled to claim, in addition to his ordinary royalty, a manufacturing profit; and, *à fortiori*, not such a manufacturing profit as he would have made if every unlicensed machine had been sent to him to be fitted with the invention.

Secus, if he had been in the habit of charging infringers with a higher royalty than ordinary licensees.

The Plaintiff having, in another suit, obtained a decree against certain wrongful users (not being manufacturers) of unlicensed machines fitted by the Defendant with his invention, had in some instances been paid his ordinary royalty by such users:—

Held, that, in every such instance, no further royalty was payable by the manufacturer.

THE question on this adjourned summons was, whether the Plaintiff, a patentee, who had obtained a decree for an injunction and for damages against the Defendants for using and selling his invention, was entitled to a manufacturing profit on the cost of materials and labour incurred in altering the piece of mechanism to a part of which the invention applied, in addition to his ordinary royalty.

The patent was for "an improvement in the bearings or bushes for the shafts of screw and submerged propellers." The Defendant was a manufacturer who had introduced the Plaintiff's invention into ships whose machinery he repaired.

The bill in the suit prayed for an injunction; and also as follows: "That the Defendants may be decreed to pay to the Plaintiff damages or compensation for the injury sustained by him by reason of their infringement of his said letters-patent, or that the Defendants may be decreed to account with the Plaintiff, and to pay to him all profit made by them by means of the Plaintiff's said invention, and that an inquiry may be made as to

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the vessels the screw propellers whereof the Defendants have fitted with wooden bearings or bushes made in the mode described in the said specification, or merely colourably differing therefrom, and as to the engines and screw propellers to which the Defendants have fitted such wooden bearings or bushes."

On the 14th of December, 1866, a decree was made whereby an injunction was granted to restrain the Defendants from using the invention within the limits of the British islands; and it was ordered that an inquiry be made what damages the Plaintiff had sustained "by reason of the user or vending of the said invention;" with an order for payment within one month after the date of the certificate, together with the costs of the suit.

On the 4th of November, 1867, the Chief Clerk certified, as the result of the above inquiry, that the Plaintiff had sustained damage, by reason of user and vending of his invention, to the amount of £147 10*s*. This sum was made up of two items; one of £116, in respect of the non-payment of the sum of 2*s*. 6*d*. per horse-power (the Plaintiff's ordinary royalty) of the engines on board ten ships which had been fitted by the Defendants with the Plaintiff's invention, the total horse-power being 928; the other of £31 10*s*. for costs, charges, and expenses incurred by the Plaintiff in recovering the same royalty on other vessels so fitted by the Defendants, for which the royalty had been paid by the owners or agents. The Chief Clerk had disallowed a claim which the Plaintiff had made in respect of the profit of which he had been deprived by reason of the Defendants having wrongfully fitted the invention to the above-mentioned ten vessels, and also to fifty-eight other vessels, for which the royalty had been paid by the owners or agents, the total horse-power being 12,517. For this royalty and profit together the Plaintiff claimed the sum of £2005 15*s*. 4*d*., the amount being determined by a return which one of the Defendants had made, on affidavit, of the profits his firm had made on the various items of material and labour that were expended in fitting the several propeller shafts in all the sixty-eight cases above referred to.

On the application of the Plaintiff the inquiry was adjourned into Court, on the question of this disallowance, and now came on for argument.

A further question was discussed, as to the extent to which this profit was to be estimated, whether upon the labour and material only of putting the wooden strips into the propellers, or upon the labour of the whole job of taking out the propeller shafts, fitting them with the strips, and putting them in again, and of all the materials, wood, iron, and brass, required for such fitting.

Mr. *Cotton*, Q.C. (Mr. *T. Aston*, with him), for the Plaintiff:—

The distinction between royalty, *i.e.*, patent profit, and manufacturing profit, is well recognised in the Privy Council: *Galloway's Patent* (1).

In this case we take Messrs. *Jack's* profit as a measure of Mr. *Penn's* loss, being the amount which Mr. *Penn* would have made if he had been employed to fit these vessels with his invention.

The result of the suit has established the Defendants as wrongdoers; and we maintain that beyond the 2*s.* 6*d.*, which alone the Chief Clerk has allowed, the Plaintiff is entitled by way of damages to the amount which a jury would say the Plaintiff has lost by being deprived of his chance of fitting these ships: *Davenport* v. *Rylands* (2); *Walton* v. *Lavater* (3).

The VICE-CHANCELLOR:— Did you not condone the damages when you accepted the royalty?

Mr. *Cotton*:—We have condoned the damages only as against other users.

Mr. *Kay*, Q.C., and Mr. *North*, for the Defendants:—

The prayer of the bill is in the alternative.

Has the Plaintiff attempted to prove, or can he possibly prove, that he would have had these jobs if the Defendants had not used his invention? It may be that the reason for employing the Defendants was, that the employers knew that this invention of the Plaintiff's would be adopted. Licenses were always given by the Plaintiff to any builder who applied for them. The whole world might have done what we have done on paying 2*s.* 6*d.* per horse-power.

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(1) Webster's Pat. Cas. 724, 729. (2) Law Rep. 1 Eq. 302, 303. 12 Jur. N.S. 571
(3) 8 C. B. (N.S.) 162, 191.

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No jury would give a farthing damages beyond the 2*s.* 6*d.*: *Betts* v. *De Vitre* (1).

It is contrary to principle that the Plaintiff should take both damages and patent profits. He must be restricted to one or the other: *Hills* v. *Evans* (2); *Needham* v. *Oxley* (3); *Penn* v. *Bibby* (4); *Betts* v. *De Vitre* (1).

Mr. *Cotton*, in reply.

SIR W. PAGE WOOD, V.C.:—

There are three portions into which the relief which has been obtained by the Plaintiff in this suit may be divided.

The first is in respect of the vexation and annoyance of a law suit, for which he is entitled to his costs; and although, unfortunately, costs are a very inadequate compensation for the expense and vexation of a law suit, yet the Court, so far, is not empowered to give the Plaintiff damages, or any sum beyond what he is entitled to as his ordinary costs of suit.

Secondly, he is enabled, for ever, to restrain the Defendants from again infringing his patent; and hence he is in a condition, for the future, to make any bargain he pleases, to any amount: he may say to everybody, "You shall not manufacture again, using my invention, without paying me 5*s.* per horse-power," instead of 2*s.* 6*d.* as at present.

Then the third branch of relief is that which is granted in the shape of damages for the loss which the Plaintiff has actually sustained by the conduct of the Defendants, irrespective of the vexation and expense of a law suit. With reference to this, I have to ask myself, what would have been the condition of the Plaintiff if the Defendants had acted properly, instead of acting improperly. That condition, if it can be ascertained, will, I apprehend, be the proper measure of the Plaintiff's loss.

Now, if the Plaintiff's case had been one of a patentee who had never granted a license, and had always remained his own manufacturer, the question, as I observed in *Betts* v. *De Vitre*, would have been one of great difficulty; and I do not hesitate to say I should not have attempted to grapple with it, but I should have sent it to a jury to settle the amount of damages.

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(1) 34 L. J. (Ch.) 289. 11 Jur. N.S. 9, 217
(2) 31 Ibid. 457, 466. 8 Jur. N.S. 525
(3) 11 W. R. 852. 9 Jur. N.S. 578.
(4) Law Rep. 3 Eq. 308.

But here is a case where the patentee is not in the habit of manufacturing the articles to which the patent applies, or, at all events, very seldom does so; but he has been in the habit of granting, not general shipbuilders' licenses, but a particular license of 2*s.* 6*d.* per horse-power for each ship which is about to be built with his invention. The Defendants, accordingly, if they had applied, as they ought to have applied, to the Plaintiff, would have had to pay 2*s.* 6*d.* per horse-power for every ship which they built with his invention. That is the amount which the Plaintiff got from everybody else; and it does not appear to me that he is entitled to anything more from the Defendants.

It has been contended that the Plaintiff has lost more than this 2*s.* 6*d.* per horse-power; he is said to have lost a profit besides. But he has himself estimated that profit at 2*s.* 6*d.* per horse-power. If he had fitted these ships with his invention himself he would no doubt have had to run risks of bad debts, of bad materials, of losses upon contracts arising from the rise and fall of timber, from strikes, and the like; and he would have expected to make a profit sufficient to cover these risks; but he has shewn that he considers he may as well hand over the right to everybody else on being paid 2*s.* 6*d.* per horse-power. He might prevent any shipbuilder from using this invention at all, and there would then be the chance of business being brought to his yard; but, taking everything into consideration, he finds he can afford to surrender all profit from fitting these ships, and all chance of profit from being employed to build ships himself, upon being paid this royalty.

The case of *Galloway's Patent* (1), in the Privy Council, which was cited, shews this, that where the assignee of a patentee has himself manufactured the thing of which the patented article forms a part, and has made a manufacturing profit, the Court will not look upon that as a profit obtained through the patent, in other words, as part of the monopoly profit.

In this instance the difficulty would be enormous were I to assume that the Plaintiff has really lost any of these jobs by reason of the Defendants having been employed to do them, when anybody in the

(1) Webster's Pat. Cas. 724, 729.

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trade might have applied for leave to do the same thing, and would have obtained a license from the Plaintiff to do so on payment of 2*s.* 6*d.* per horse-power. It seems to me impossible to say that the Plaintiff would have obtained any of these jobs, if the Defendants had only abstained from using his invention until they obtained his license. As the Plaintiff considered himself fully compensated by the 2*s.* 6*d.* in every case in which he granted a license, it appears to me that where the step has been taken without his leave, that is the proper measure of the compensation.

It was pressed upon me in argument that I ought to give the Plaintiff the amount of damages which a jury might be disposed to give on account of the improper conduct of the Defendants. But, as I have said, the Court has not, nor can a jury have, any power to estimate damage arising from the vexation or annoyance which the wrongdoing of the Defendants may have occasioned.

If it had been necessary to go further into the case I should have said that the Plaintiff's claim for compensation for not having had the whole job to do, appears to me to be quite extravagant. It is clear he would have been entitled only to the profit of putting in the particular article patented. It must be taken as if the vessel had come in to be cleaned and repaired in such a way as that the cleaning and repairing required the propeller shaft to be taken out. The Plaintiff would have been entitled (if at all) to the profit of fitting in the apparatus; but he cannot be heard to say that he lost the job of taking out the propeller and putting it in again, and that consequently he is entitled to a profit upon it.

Then comes the question of whether the Plaintiff is entitled to anything more from the Defendants in respect of those ships for which he has been paid already by the owners or agents. I think, with regard to this question, I am bound to decide it on the principle, that the Plaintiff, having received the payment, has not lost it; that is to say, that the Plaintiff's loss of 2*s.* 6*d.* arising from the Defendants' non-payment has not accrued, and, consequently, that the Defendants are not bound to pay it over again.

It may be supposed that the Defendants gain an unfair advantage by having the royalty paid by the users. I certainly think that if the Plaintiff had been in the habit of demanding 2*s.* 6*d.* per horse-power from the users for the use of the invention, and if the Defendants, the manufacturers, had paid the 2*s.* 6*d.*, it might not have followed that the users would have gone scot free, because the Defendants would have paid the 2*s.* 6*d.* in consideration of a license granted to them as manufacturers. It further occurred to me, that if the Plaintiff had been in the habit of saying, "I charge 2*s.* 6*d.* to all those licensees who do not infringe, but I shall charge 5*s.* to all those persons who do infringe," the Defendants, being in the latter category, might have been fairly chargeable with the 5*s.* But nothing of that kind is proved to have happened here. All that appears is, that in some instances, where persons have been convicted of infringement, the Plaintiff has said: "I shall not let you off unless you pay me 5*s.*" But those were instances of special bargains. The system does not appear to have been established as a general one with respect to all parties. Or the Plaintiff might have said, "I shall charge every person who applies to me within the first year or two of my patent 2*s.* 6*d.*; but everyone who applies to me afterwards must pay me 5*s.*" But there is no trace of that.

I cannot find that the Plaintiff has lost more than 2*s.* 6*d.* per horse-power of those vessels for which he has not been paid; and I cannot find that he has lost anything in respect of those vessels for which he has been paid. Therefore his damage must be confined to 2*s.* 6*d.* per horse-power of those ships for which he has not been paid. The costs of this hearing must be paid by the Plaintiff.

Mr. *Kay* asked for the costs of the claim in Chambers, but

The VICE-CHANCELLOR declined to make any order except as to the costs of the present hearing.

Solicitors for the Plaintiff: Messrs. *Hill, Son, & Heald.*
Solicitors for the Defendants: Messrs. *Norris & Allen.*

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35 Beav 317
3 Ch 558
Eq 608-9

In re BROWN'S TRUSTS.

Reversionary Interest—Assignment—Notice to Trustee—Insolvency—Priority.

Formal notice to the trustee of a fund in which an insolvent is interested, is necessary to give the assignee in insolvency priority over subsequent incumbrancers who have given notice. Therefore knowledge of the insolvency acquired *aliunde* by the solicitor of the trustees *held* insufficient to give priority to the assignee.

THIS was a Petition for payment of money out of Court, and the question arose as to the priorities of various claimants to the fund.

William Brocklebank, in 1838, being entitled in right of his wife to a reversionary interest in a sum of stock standing in the names of trustees, became insolvent, and in the schedule of his assets filed under his insolvency he inserted such reversionary interest. No formal notice of the insolvency was ever given by the provisional assignee to the trustees of the fund, and no creditors' assignee was appointed till quite recently.

In 1844, *William Brocklebank* and his wife assigned the reversionary interest to Mr. *Burkitt* to secure an annuity, and in 1849 mortgaged it to the present Petitioner, Mr. *Boston.* Formal notice of these deeds were given to the trustees of the fund.

Mrs. *Brocklebank* died in 1861, and the fund representing the reversionary interest being in Court, the present Petition for payment out of Court was presented.

Among the creditors of *William Brocklebank* under his insolvency was the solicitor to the trustees of the fund.

Mr. *Roxburgh,* Q.C., and Mr. *Rodwell,* for the Petitioner:—

An assignee in bankruptcy or insolvency has no right of priority to a fund over subsequent mortgagees who have given notice to the trustees of the fund, unless he has given notice to such trustees. Such notice must be a direct formal notice, and no notice acquired indirectly will be sufficient as against subsequent mortgagees who have given formal notice of their securities: *Lloyd* v. *Banks* (1); *In re Atkinson's Trusts* (2).

(1) Law Rep. 4 Eq. 222.
[illegible]

(2) 4 De G. & Sm. 548; 2 D. M. & G. 140.

Mr. *G. Lovell,* for the second mortgagee.

Mr. *Hallett,* for the creditors' assignee:—

Although it is true that the assignee in insolvency did not give the trustees of the fund direct formal notice of the insolvency, yet their solicitor was one of the creditors under it, and notice to the solicitor is notice to the trustees; and knowing of the insolvency for one purpose, they must be fixed with notice for every purpose: *Browne* v. *Savage* (1); *Tibbits* v. *George* (2). The assignees for value were guilty of negligence in not applying to know whether the trustees knew of any incumbrance: *Burrowes* v. *Lock* (3); *Etty* v. *Bridges* (4).

Mr. *Holland,* for the trustees of the fund.

SIR R. MALINS, V.C.:—

I am of opinion that the assignee is not entitled to priority over the subsequent mortgagees. It was the duty of the provisional assignee to have given notice to the trustees of the fund, so as to protect it against subsequent incumbrances, but that was not done; and the assignee now claims that, being prior in point of time, although he gave no notice to the trustees of the fund, yet that their solicitor knew of the insolvency, and that his knowledge was sufficient.

The true principle on which questions of priority depend is, that it is incumbent on all persons dealing with *choses in action* to do all that is in their power to perfect their title, and they do not do so unless they give notice to the persons in whose hands such property is.

It is contended that it was the duty of the subsequent mortgagees to have asked the trustees whether they were aware of any incumbrances on the fund. It is true that neither of them did so; but the omission to make such inquiry is not fatal to the priority they have acquired by their formal notice to the trustees.

I think these questions of notice should not be left open to speculation, but that formal notice should be required, otherwise

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(1) 4 Drew. 635; 5 Jur. N.S. 1020

(2) 5 Ad. & E. 107.

(3) 10 Ves. 470.

(4) 2 Y. & C. Ch. 486.

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indirect notices might be alleged, raising most embarrassing questions, which should be avoided. It might, for example, be alleged that a trustee may have heard of the insolvency in the course of conversation. In the present case the absence of formal notice in effect left the fund at the disposition of the insolvent, and he has, in fact, disposed of it.

I find the principle which I consider the right one was acted on by the Master of the Rolls in *Lloyd* v. *Banks* (1), in which case it was clear that the trustee did know of the insolvency by having seen a notice of it in the newspapers, but His Lordship held that such indirect notice was not sufficient. I am very happy in following that decision, as it is so easy to give formal notice that there is no excuse for not doing so.

I must, therefore, hold that the mere fact of the trustees' solicitors knowing of the insolvency was not sufficient notice to the trustees to take the fund out of the disposition of the insolvent, as I think if the trustees had been asked whether they knew of it they would have replied in the negative. The assignee must, therefore, be postponed to the two mortgagees, as between whom I understand no question arises.

Costs of all parties out of fund.

Solicitors for Petitioner: Messrs. *J. & C. Robinson.*

Solicitors for Respondents: Messrs. *Nichols & Clark;* Mr. *R. Walthew;* Mr. *Rye.*

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(1) Law Rep. 4 Eq. 222.

CLARK *v.* LORD RIVERS.

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Nov. 12.

Demurrer—Specific Performance—Inconsistent Allegations—Solicitor and Client—Pleading—Alternative Relief.

4 Ch. 549.
16 Eq 66
5 Ch. D. 69
2 Ex. D. 303,

A contract having been entered into by a firm of solicitors acting on behalf of their client, to pay the Plaintiff certain sums of money, the Plaintiff filed his bill against the client and the solicitors, alleging that the client was bound by the contract, but that the client denied that he was so bound, on the ground that the solicitors had no authority to enter into such contract; and the bill prayed specific performance by the client; or otherwise, if it should appear that the solicitors were not authorized, then that the solicitors themselves might be declared personally liable to perform the same.

A demurrer to the bill by the solicitors was allowed on the ground that the Plaintiff did not himself allege that the client was not bound, and, also, that alternative relief could not be prayed against one Defendant in case relief could not be obtained against another Defendant.

THIS was a demurrer to an amended bill. The material allegations were as follows:—The Plaintiff, *Edward Rawson Clark*, had sued the Defendant, Lord *Rivers*, at law on a bond. Lord *Rivers* filed his bill to restrain the action, and an order was made on the 4th of July, 1867, that judgment should be given by Lord *Rivers* in the action, to be dealt with as the Court should direct, without prejudice to the Plaintiff's right to insist upon the amount claimed being brought into Court. Proposals were then made with a view to a settlement of the questions in dispute between the Plaintiff and Lord *Rivers*, and several interviews took place between the Defendant, *Edward Henry Rickards*, of the firm of *Rickards & Walker*, as the solicitor for and agent of the Defendant, Lord *Rivers*, and *Joseph Bilke Churchill*, of the firm of *Churchill & Barry*, as the solicitor for and agent of the Plaintiff, and eventually, on the 26th of July, 1867, an agreement was signed by *Churchill* as the duly authorized agent and on behalf of the Plaintiff, and by the Defendant *Rickards*, with the knowledge and consent of the Defendant, *Samuel Walker*, as his partner, in the name of his firm, as the duly authorized agent and on behalf of the Defendant, Lord *Rivers*, and by that agreement it was arranged that the amount due for principal, interest, and premiums under the bond should be taken at £17,232, which amount was to be paid by instalments in manner therein mentioned, the first instalment of £1000 to be paid by Lord *Rivers* on the 8th of August then following.

The bill also charged that the agreement was binding on Lord *Rivers*, but that he had evaded or neglected to perform it, and had made default in payment of the sum of £1000, which was to be paid by the 8th of August. That Lord *Rivers* now alleged that he was not bound by the agreement, and denied that the Defendants, Messrs. *Rickards & Walker*, or either of them, had any authority to enter into such agreement on his behalf, but the Plaintiff charged that if the Defendants, *Rickards & Walker*, had no authority to enter into such agreement, then they had committed a fraud upon the Plaintiff, and were personally liable to perform such agreement so far as they could. The bill prayed that the agreement of the 26th of July, 1867, might be specifically performed by Lord *Rivers;* or otherwise, if it should appear that the Defendants, *Rickards & Walker*, had no authority to enter into the said agreement on behalf of Lord *Rivers*, then that the said *Rickards & Walker* might be declared to be personally liable to perform the agreement, so far as they could perform the same.

The original bill had been filed on the 14th of August, by which specific performance was prayed against Lord *Rivers* only, and no relief was prayed against Messrs. *Rickards & Walker*. On the 30th of August a demurrer to the whole of the bill had been filed, and on the 7th of October the Plaintiff had submitted to the demurrer, and obtained an order to amend. Amendments were then made by which Messrs. *Rickards & Walker* were made parties, and the present relief prayed in the alternative against them. They now demurred to the bill for want of equity.

Mr. *Karslake*, Q.C., and Mr. *Chitty*, for the demurrer:—

This bill is of an entirely novel construction, and cannot be supported upon the principles acted upon in this Court. The Plaintiff's case may be thus stated. He avers that Messrs. *Rickards & Walker* were the solicitors acting for Lord *Rivers*, and that on his behalf they entered into the agreement set forth.

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Then he alleges that Lord *Rivers* is bound by the agreement, but that Lord *Rivers* repudiates it, alleging that *Rickards & Walker* were not authorized by him, and that he is not bound by such agreement; and upon these inconsistent allegations he prays that Lord *Rivers* may be declared bound by the agreement, or, in the alternative, that specific performance may be decreed against Messrs. *Rickards & Walker.* There is no allegation by the Plaintiff that Messrs. *Rickards & Walker* were not authorized to sign the agreement; on the contrary, it is alleged that they were authorized, but in order to pray the alternative relief the bill states that Lord *Rivers* alleges they were not authorized, and then it prays specific performance by Messrs. *Rickards & Walker* of an agreement to which they were not even parties. In other words, it is a prayer for hypothetical alternative relief upon a case which is alleged by the bill not to exist.

An agent is not a proper party to a bill in which specific performance is prayed against his principal: *Attorney-General* v. *Earl of Chesterfield* (1); *Jenkins* v. *Hutchinson* (2). If *Rickards & Walker* had no authority to enter into the agreement, the remedy against them would be by an action for damages, and not by a suit in equity; at any rate, there is no case against them until Lord *Rivers* has put in his answer and denied their authority, which it is very unlikely he will ever do under the circumstances of this case. You cannot have alternative relief against two persons—it must be against the same person. You cannot ask relief against Lord *Rivers*, and then say, if he is not bound you require relief against another person: *Seddon* v. *Connell* (3); *Rawlings* v. *Lambert* (4); *Sainsbury* v. *Jones* (5). If the Defendants, *Rickards & Walker*, had no authority from Lord *Rivers*, then they are not liable to be sued as principals: *Lewis* v. *Nicholson* (6). You cannot have relief against a person upon the mere allegation that a third person alleges that which the Plaintiff does not allege; that was decided in *White* v. *Smale* (7).

(1) 18 Beav. 596. 18 Jur 608
(2) 13 Q. B. 744.
(3) 10 Sim. 79.
(4) 1 J. & H. 458.
(5) 2 Beav. 462; 5 My. & Cr. 1.
(6) 18 Q. B. 503.
(7) 22 Beav. 72.

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Mr. *Glasse*, Q.C., and Mr. *Hastings*, in support of the bill:—

This case has been argued as if Lord *Rivers* had consented to be bound by this agreement, which he has not. The bill states that he has repudiated the agreement, and has refused to be bound by it, and on that ground it is that the bill prays relief against those who signed the agreement. An agent who signs an agreement alleging that he has authority, is himself liable if he has not authority, because he has committed a fraud in assuming a character which he had not. This is laid down in *Storey's* Law of Agency (1). In *Johnson* v. *Ogilby* (2) a bill very similar to this was filed where an attorney, on behalf of his client, had promised to pay £500 to the Plaintiff. The Lord Chancellor, Lord *Talbot*, said, "The difference is where the party thus undertaking for and on the behalf of his client has an authority so to do, and where he has not. If such undertaker has no authority, then it is a fraud, and the undertaker ought himself to be liable." In that case, his Lordship was of opinion that the attorney had authority from his client, therefore he was not liable. If Messrs. *Rickards & Walker* had no authority from Lord *Rivers*, then they are liable in damages, and since *Lord Cairns' Act* (21 & 22 Vict. c. 27) was passed it is not necessary to go to law upon an action to recover damages. The Court may now give damages for the wrong sustained by the Plaintiff, if it cannot compel specific performance of the agreement by the Defendants. If Lord *Rivers* had not repudiated this contract, the Plaintiff would have had no occasion to shape his bill in the present form; the novelty of its construction arises from the peculiar circumstances of the case. The Plaintiff had no other course to take, unless he had waited for the answer of Lord *Rivers*, which he was not bound to do, well knowing what the effect of that answer would be. As to the bill being filed against both principal and agent, there is an authority for it in the case of *Chadwick* v. *Maden* (3), where a purchase took place at a sale by a person who declared that he had purchased as agent for a third party, and both principal and agent were made parties to the bill for specific performance.

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(1) Page 426.
(2) 3 P. Wms. 277.
(3) 9 Hare, 188.

SIR R. MALINS, V.C. :—

The Plaintiff, Mr. *Edward Rawson Clark*, having pecuniary demands of considerable amount against Lord *Rivers*, was about to institute, or had instituted, proceedings for the purpose of establishing his claims. Lord *Rivers*, in all the negotiations, was represented by a firm of solicitors, Messrs. *Rickards & Walker*. Mr. *Clark* was represented by his solicitors, Messrs. *Churchill & Barry*, and, as is not uncommon in such cases, the solicitors met, and came to a concluded agreement by which the litigation was stayed upon certain terms, that is, upon the terms of payments to a considerable amount being made, partly to the solicitors, and also on payment of a sum of no less £8,000 into Court in a particular cause.

Now, the contract on both sides is merely between the solicitors as agents for the principals; and this bill is filed for the purpose of enforcing specific performance of that agreement, which was dated the 26th of July last, against Lord *Rivers*. Incidentally, many incumbrancers of Lord *Rivers* are made parties, but, substantially, the question is one of specific performance of that contract against Lord *Rivers*. This bill charges that Lord *Rivers* is bound by that contract, and that the same ought to be performed. It was argued that it was not an allegation, but a charge is an allegation. It is an allegation in the bill—it is an allegation by the Plaintiff that Lord *Rivers* is bound by the contract. Now, does the Plaintiff say that Lord *Rivers* is not bound by the contract? He cannot blow hot and cold. He cannot be permitted in the same bill to say that Lord *Rivers* is bound and that he is not bound by the contract, and, accordingly, the pleader avoids that by alleging, in a subsequent paragraph, not that he, the Plaintiff, alleges that Lord *Rivers* is not bound, but that Lord *Rivers* alleges himself that he is not bound by the contract, and upon that allegation that Lord *Rivers* is not bound, he introduces, by amendment, an allegation that if the Defendants, *Rickards & Walker*, had no authority to enter into the agreement, then they have committed a fraud upon the Plaintiff, and are personally liable to the Plaintiff to perform such agreement so far as they can, and the bill accordingly prays relief in pursuance of that allegation.

I stated in the course of the argument that this is a frame of bill perfectly new to me—I have never seen it before. I do not believe that anyone in Court has ever seen a bill thus framed, and it involves the most material considerations as affecting the practice of this Court; and as affecting the interests of those who conduct business in this country, because if this bill is allowable there is not a single case in which a contract is entered into by a solicitor, or any other person, on behalf of a client, in which, before you have any reason whatever to question the fact of the principal being bound, you may not make the agent a party, and pray in the alternative that if the principal is not bound the agent shall be bound. The consequence of that would be perfectly astounding, because every solicitor practising in these Courts may find himself in this position, that it will be absolutely unsafe to enter into contracts on behalf of his client, because any litigious Plaintiff may immediately file a bill seeking performance of the contract, and charging, not that he himself alleges, but that the Defendant alleges, that he is not bound, there being no foundation for the allegation, and make the solicitor a party, and pray relief against him. It is not agreeable to any man to be a Defendant to an adverse Chancery suit, and I should be very sorry to sanction any principle which might lead to an increase in the number of Defendants, and to the multiplication of litigant parties. But the extraordinary part of the case is, that before Lord *Rivers* has put in an answer, before he has had an opportunity of making any statement on the subject, it has been thought necessary to amend this bill by making his solicitors parties, who, undoubtedly, if he should put in an answer admitting their authority, are improperly made parties, and who, at all events, ought not to have been made parties until Lord *Rivers* has put in an answer. However, independently of that, I think this bill violates the rules of the Court; because if you are to seek relief against a Defendant, you must seek it upon allegations that you are entitled to that relief, and you cannot be entitled to relief against Messrs. *Rickards & Walker* unless they did in point of fact enter into this contract for Lord *Rivers* without any authority from him to do so.

If the Plaintiff is entitled to relief, he must allege, not that

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Lord *Rivers* alleges, but that he himself alleges, that Messrs. *Rickards & Walker* entered into this contract without authority from their client. The bill contains no such allegation; and although many authorities have been cited, I think they are all summed up, and the essence of them is contained, in the decision of Lord *Romilly* in the case of *White* v. *Smale* (1), where he allowed a demurrer precisely on the ground on which I intend to allow this, that if you seek relief against a man you cannot seek it, or be entitled to it, on the ground that somebody else alleges that which you yourself do not allege.

I also proceed on the broad ground that I do not believe it is within the jurisdiction of the Court to entertain a bill in this alternative form. You may pray alternative relief against the same Defendant or Defendants, but you cannot bring different sets of Defendants and say, "If I am not entitled to relief against *A.*, I am entitled to relief against *B.*," you must make up your mind against whom you are entitled to relief. Apply that to the present case. If it turns out that this contract was entered into with *Rickards & Walker* with the authority of Lord *Rivers*, you are entitled to relief against him. If it was not, the bill against Lord *Rivers* must be dismissed. In that event there will be a remedy against Messrs. *Rickards & Walker*, but I apprehend not by bill in this Court, because it would be a mere money demand against them. It is a bill for specific performance against Lord *Rivers*, and for a declaration that the Plaintiff is entitled to a charge upon the land; but as against Messrs. *Rickards & Walker* it is a mere money demand, and I cannot accede to the argument that *Lord Cairns' Act* has made the slightest difference in the principle of this Court, as to giving damages in such cases. You can substitute damages for the relief previously given against a proper Defendant, but you cannot sue a person whom you were not entitled to sue before. Damages must be asked as an alternative remedy against the person against whom you might have been entitled to the original remedy before that Act passed. Therefore in this case my opinion is, that if it should turn out that the Plaintiff is not entitled to any relief against Lord *Rivers*, on the ground that Messrs. *Rickards & Walker* believed that they had

(1) 22 Beav. 72.

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authority, and misled the Plaintiff, it may well be that the Plaintiff would have a remedy against them; but I am clearly of opinion that that remedy would not be in this Court, but in a Court of law, in the nature of an action of deceit for the damage sustained. On all these grounds, I have no hesitation in saying that the demurrer must be allowed with costs.

Solicitors for the Plaintiff: Messrs. *Churchill & Barry.*

Solicitors for the Demurring Parties: Messrs. *Rickards & Walker.*

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18 Eq 21

Practice—Administration—Residuary Legatee—Jurisdiction—Right of Legatee, not a Party to Suit, to follow Assets in hands of residuary Legatee-Plaintiff—Legacy—Statute of Limitations—Right to set up Statute precluded by Certificate.

In a suit by a residuary legatee for the administration of the testator's estate, the Court has jurisdiction to compel the residuary legatee to refund, for the purpose of paying the legacy of a legatee who is not a party to the suit, assets paid to the residuary legatee by the executor before the suit.

In an administration suit instituted by a residuary legatee more than twenty years after the testator's death, the Chief Clerk's certificate found that certain legacies remained unpaid, and, by the order on further consideration, liberty was given to any persons claiming to be entitled to the legacies to apply as to their payment. The legatees, who were not parties to the suit, having applied, under the order, for payment of their legacies:—

Held, that the residuary legatee was precluded by the certificate and order from setting up the *Statute of Limitations.*

THIS was a suit for the administration of the estate of *Thomas Jones*, who died on the 5th of June, 1838. The testator, by his will, dated the 2nd of December, 1836, bequeathed, among other legacies, £100 to *Richard Holme*, and £50 to Mrs. *Earl*, and gave the residue of his estate to the trustees for the time being of a settlement made on his daughter's marriage, to be held upon the trusts of the settlement; by a codicil of the same date he gave to *Thomas Holme* £150, and to *Richard Holme* an additional legacy of £150, to be paid respectively at the death of his wife. She died in 1859.

The suit was instituted in 1863 by the trustees of the settlement against the executors, and in November, 1864, the common administration decree was made.

By the Chief Clerk's certificate, dated the 14th of March, 1866, it was certified that the only legacies given by the testator that remained unpaid were the legacies to *Richard Holme*, *Thomas Holme*, and Mrs. *Earl*, that all the debts had been paid, that £4000 and £666 13*s.* 4*d.* consols had been paid and transferred to the Plaintiffs, as residuary legatees, and that sums amounting to £815 were due from the Defendants.

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The Plaintiffs did not seek to vary the certificate, and on the 12th of March, 1867, the cause coming on upon further consideration, a decretal order was made directing payment into Court by the Defendants of the moneys found due from them, and the payment thereout of the costs, and ordering "that any person claiming to be entitled to receive any of the legacies appearing by the Chief Clerk's certificate to remain unpaid, or the Plaintiffs, as the trustees of the settlement, should have liberty to apply in Chambers as to the payment of any of the said legacies, and as to the payment out of Court and application of any surplus which should remain in Court after payment of the costs."

After the filing of the certificate, the Defendants' solicitor, with the consent of the Plaintiffs, made inquiries, by advertisement and otherwise, for the legatees, and in consequence of such inquiries administration was taken out to the estate of Mrs. *Earl*, who died in 1840. None of the legatees appeared at the hearing upon further consideration, but in June, 1867, *Richard Holme*, and the representatives of *Thomas Holme*, who died in 1844, and of Mrs. *Earl*, applied, under the liberty given by the order on further consideration, for payment of the legacies, and the Plaintiffs having objected that the legacies given by the will to *Richard Holme* and Mrs. *Earl*, which were payable at the end of a year from the testator's death, were barred by the *Statute of Limitations*, the application was adjourned into Court.

The fund in Court, after payment of the costs of the suit, was £124 15*s*. 8*d*.

Mr. *Andrew Thomson*, for the Applicants:—

It is too late now for the Plaintiffs to set up the *Statute of Limitations* as a bar to the claim of the legatees. The defence of the statute must be raised at the earliest possible opportunity. The Plaintiffs might have raised it before the Chief Clerk, in which case he would not have certified that these legacies remained unpaid without reserving the question, whether they were barred by the statute, for the consideration of the Court: *Binns* v. *Nichols* (1); *Alston* v. *Trollope* (2); or, if the Chief Clerk had overruled the objection, they might have moved to vary the certificate. But they allowed the certificate to become binding, and accordingly the decretal order expressly recognises the claims of the legatees and gives them liberty to apply. Moreover, having consented to the advertisement for the legatees, in consequence of which the expense of taking out administration to Mr. *Earl's* estate has been incurred, they will not be allowed to turn round and say that the legacies are barred: *Andrews* v. *Brown* (1). [He also referred to *Reed* v. *Fenn* (2).]

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(1) Law Rep. 2 Eq. 256.

(2) Law Rep. 2 Eq. 205. 35 Beav 466.

Mr. *Southgate,* Q.C., and Mr. *Marten,* for the Plaintiffs:—

First: The Court has no jurisdiction in this suit, to which the legatees are not parties, to compel the residuary legatees to refund for the purpose of paying the legacies, money received by them before the suit. If the legatees seek to follow the assets into the hands of the residuary legatees, they must institute a suit against the residuary legatees for that purpose. The liberty to apply given to the legatees by the order on further consideration was only intended to refer to payment of their legacies out of the fund in Court after payment of costs.

Secondly: The Plaintiffs are not precluded from setting up the *Statute of Limitations.* No one is bound to set up the statute until a claim is made against him, and this is the first time these legacies have been claimed. How can the certificate and the order on further consideration, which were made in the absence of the legatees, and are not binding upon them, preclude the Plaintiffs from raising any question as against them? If the legatees had appeared at the hearing on further consideration, the Plaintiffs would have set up the statute and the legacies would have been disallowed, and the Plaintiffs ought not to be in a worse position because the legatees chose to lie by, and take their chance of coming in under the order, which was not intended to give them any right.

LORD ROMILLY, M.R.:—

Two questions arise upon this summons, both of which are of some interest as respects the practice of this Court, and it is important that they should be kept perfectly distinct. One is, whether in a suit of this form a legacy can be recovered from the residuary legatees who have been overpaid before the suit; the other is, whether, under the particular circumstances of the present case, assuming that the legatees can recover their legacies in this suit, the persons from whom they claim it can now set up the *Statute of Limitations* against them.

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(1) Prec. Ch. 385.

(2) 35 L. J. (Ch.) 464.

The residuary legatees have instituted this suit against the executors for the administration of the testator's estate; before the suit they had received money from the executors, and I must assume that they had been overpaid. Now a residuary legatee, who files a bill for administration, enters thereby into an undertaking, not expressed, but clearly understood according to the practice of the Court, that he will repay the amount, if any, by which he has been overpaid. In the present case it appears that the residuary legatees have received upwards of £4000, and that certain legacies have not been paid. Can the residuary legatees say to the pecuniary legatees, "You shall not be paid, because the executors have overpaid us, and you must file a bill against us for the purpose of getting the money back." I think not. I think that the fact of the residuary legatees having received the money from the executors before the suit does not preclude the Court from compelling them in this suit to refund it for the purpose of having it applied in a due course of administration, that is, in payment of the legacies. Upon the first question, therefore, I hold that the Court has jurisdiction, and is bound, to order payment by the residuary legatees, and that the fact of the bill being filed twenty-five years after the testator's death does not affect the obligation of the residuary legatees to refund, or the duty of the Court to compel them so to do.

The other question is one of some nicety. The accounts under the decree having been taken in the usual way, the Chief Clerk, by his certificate, finds that certain legacies are unpaid, in other words, that they are due. No exception is taken to the certificate; the residuary legatees themselves, being the Plaintiffs, take out the certificate, and bring on the cause for further consideration. The legatees know nothing about it. Then, upon this certificate a decretal order is made on further consideration, which gives to

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the persons claiming the legacies liberty to apply; it also gives to the Plaintiffs liberty to apply, but that does not affect the liberty given to the legatees. The meaning of that order is, that there is nothing left to be done but for the legatees, or their representatives, to come in and establish their identity and their title, the fact that the legacies are due being already established. Under that liberty to apply these legatees have come in and applied for their legacies, and now they are told, nearly two years after the date of the certificate, and ten months after the decretal order, that the certificate is wrong, and that their claim is barred by the statute. I am of opinion that the residuary legatees are bound by their own acts, and that they cannot now raise the objection of the *Statute of Limitations*, having neglected to raise it before the Chief Clerk's certificate became binding, and before the order on further consideration. So far from the residuary legatees having been misled by the pecuniary legatees, I think that if I allowed this objection of the statute to be now raised, the legatees would have been misled into making the application by the conduct of the residuary legatees in acquiescing in the certificate, and in the decretal order giving the legatees liberty to apply. The legacies, so far as the fund in Court is insufficient, and the costs of the application, must be paid by the Plaintiffs.

Solicitors for the Applicants: Messrs. *Farrar & Farrar.*

Solicitors for the Plaintiffs: Messrs. *Davidson, Carr, & Bannister.*

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COVENTRY *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Railway Company—Sale of Superfluous Land—Right of Pre-emption—What is Adjoining Land—Intervention of Private Road—Land used for Building Purposes—Lands Clauses Consolidation Act, s. 128.

4 HL. 614
12 ChD 4
20 ChD. 424
428

The right of pre-emption given by sect. 128 of the *Lands Clauses Consolidation Act*, to persons whose lands immediately adjoin superfluous land proposed to be sold by the promoters of the undertaking, extends to lessees for years of such adjoining lands.

Lessees of lands separated from such superfluous land by a private road, of which they had the exclusive right of user during their tenancies:—

Held to be owners of "immediately adjoining land" within the same section.

In the same section the words "lands used for building purposes" mean lands sold as building land, or let on building leases, and actually laid out for building.

THIS was a suit for an injunction to restrain the *London, Brighton, and South Coast Railway Company* from selling or disposing of a piece of superfluous land acquired by their predecessors in title under the *West London and Crystal Palace Railway Act*, 1853, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, and not required for the purposes of the railway, except to the person or persons entitled to the lands (if any) from which it was originally severed, until they should have offered it for sale to the Plaintiffs, as the owners of adjoining lands.

The land in question was a triangular piece of land, which, before it was purchased for the railway, was part of *Wandsworth Common*, and was bounded on one side by the railway, on another side by a public road, and on the other side partly by land of which the Plaintiff *Coventry* was the lessee for a long term of years, and on which he resided, and partly by a private road which separated it from three strips of land of which the other Plaintiffs, *Cummins*, *Rose*, and *Warrington* were severally the lessees for long terms of years, and on which they severally resided. The private road formed the approach to the Plaintiffs' houses, and they had, under their leases, during the terms of their tenancies the exclusive right to use it; the soil of the private road was not included in their leases, but belonged to one *Ducane*, who was the reversioner in fee of the lands of which the Plaintiffs were lessees.

The company had advertised the land for sale by auction, in lots, as building land adapted for villa residences; the conditions of sale precluded purchasers from objecting to the title on the ground of any right or supposed right of pre-emption, or of any statutory vesting, or alleged statutory vesting, of the property in any other person or persons.

The land in question was within the metropolitan district, and had been assessed for the purpose of the poor rates at the annual value of £70, although, according to the evidence for the Defendants, it was not, for agricultural or grazing purposes, worth more than £10 a year. In the immediate neighbourhood several houses had been built, and other lands had been advertised or announced by placards to be let or sold for building purposes. After the institution of the suit the Plaintiff *Coventry's* adjoining land was put up for sale by auction, and was described in the particulars of sale as a property "offering numerous advantages as a building speculation, if desired, combined with a residence possessing every comfort for a family of distinction, and which need be but little, if at all, interfered with by judicious building operations," but was not sold.

Mr. *Joshua Williams*, Q.C., and Mr. *E. R. Turner*, for the Plaintiffs:—

The land in question is not within any of the exceptions in the 128th section of the *Lands Clauses Consolidation Act* (1). It is

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(1) The following is the section above referred to:

Sect. 128. "Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot, after diligent inquiry, be found, then the like offer shall be made to the person, or to the several persons, whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption, such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit."

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clearly not "situate within a town": *Carington* v. *Wycombe Railway Company* (1); nor is it "built upon," or "used for building purposes." The latter words cannot be extended so as to mean "intended to be used for building purposes;" for, if so, a company could always evade the Act by selling their superfluous land as building land. The Plaintiffs, therefore, have the right of pre-emption under that section, being persons "whose lands immediately adjoin." It will be said that the right is only given to persons having the whole interest in the adjoining lands; but such a narrow construction of the language of the section would be contrary to the whole scope of the *Lands Clauses Act*. By the interpretation clause, sect 3, the word "lands" is made to extend to lands, tenements, and hereditaments of any tenure, and the word "owner" means any person who, under the provisions of the Act, or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking. A lessee is entitled to sue the company for trespass by entering on his lands without paying compensation: *Ramsden* v. *Manchester, &c., Railway Company* (2). The lessees in the present case, and in many other cases, are the persons most interested in preventing the superfluous land which adjoins their land from being used for any purpose detrimental to the enjoyment of their land. The intervention of the private road does not prevent the land of the Plaintiffs from being adjoining land. [On this question they were stopped by the Court.]

Mr. *Baggallay*, Q.C., and Mr. *Taylor*, for the Defendants:—

The right of pre-emption (if any) of each of the Plaintiffs applies to a separate portion of the land, according to the extent of the frontage of his adjoining land. The suit, therefore, is multifarious, and the Court would have to grant four distinct injunctions in respect of four separate pieces of land.

[The MASTER OF THE ROLLS:—That objection is not open to you at the hearing.]

The Act was intended to give the right of pre-emption to freeholders only; the promoters of the undertaking are to offer the land to the adjoining owners in such order as they think fit, and if the Plaintiffs' construction is right, they might offer it to a tenant from year to year of the adjoining land to the exclusion of the fee simple owner. The lands of the Plaintiffs, other than *Coventry*, do not immediately adjoin the land in question; they have only an easement over the private road, which is the adjoining land, and it cannot, in any sense, be said to be their land. The land in question is within the exception in the 128th section as "land used for building purposes;" those words must mean something more than "built upon." This land is in the neighbourhood of *London*, and building is going on all round it, and it is unsuited for any other purpose. The assessment shews that it is considered to be building land. Even if the Plaintiffs have the right of pre-emption the Act does not make it unlawful for the Defendants to contract with other persons for the sale of the land; in *London and Greenwich Railway Company* v. *Goodchild* (1), the Court decreed specific performance of such a contract made without offering the land to the adjoining owner. The sale will be invalid against the Plaintiffs if they are entitled to pre-emption, and they have no right to an injunction.

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(1) Law Rep. 2 Eq. 825.

(2) 1 Ex. 723.

Lord Romilly, M.R..—

I am of opinion that all the objections which have been taken on behalf of the Defendants fail.

In the first place, I am of opinion that the objection of multifariousness is too late, and that it ought to have been taken by demurrer. I do not, therefore, express any opinion whether if it had been taken at the proper time I should have allowed it or not.

The next objection is, that the Plaintiffs have only a limited interest. Now, the definition of the word "owner" in the *Lands Clauses Act*, is a person who can sell to the company, and it is clear that there must be limited interests in all cases, except where there is an owner in fee simple in possession whose land the company requires—which would rarely happen, except where the railway goes through a gentleman's park, and even in that case it would very often be found that the owner had only an estate for life. I am of opinion, therefore, that the persons whose lands adjoin the superfluous land, who are by the Act entitled to buy the

(1) 3 Railw. Cas. 507.

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superfluous land, include persons who have a limited interest. I do not know any case which determines in what way this land is to be offered to persons having limited interests. That part of the clause which directs that when there are more adjoining owners than one, the railway company shall offer it to each of them in succession, as they think fit, may possibly apply to the owners of different plots of land, and I do not know whether the persons who have limited interests, assuming that all the persons interested in one plot of adjoining land wished to become purchasers, would be entitled to have more than the same limited interest in the lands so dealt with, and whether, if they all wished to purchase it, they would not be bound to take it in the same way as the adjoining land; but I do not think it necessary to express any opinion on that subject, because that question does not arise here. I am clearly of opinion that the Plaintiffs are adjoining owners to some extent, and are entitled to have the right of pre-emption offered to them, provided all the other adjoining owners decline to take it.

I also think that there is nothing in the objection that there is an intervening private road over which the Plaintiffs have an easement. It would be impossible to hold that a person was not an adjoining owner because there was a footpath by the side of the railway between the land which the railway company had taken and his park, and yet this private road, which the Plaintiffs have a right of going over when they think fit, and of which the freehold may be in somebody else, is very little more than that. They have in fact, as I understand, the exclusive right of using the road as long as their tenancy lasts; and, if so, of course they could prevent any other person from coming there, and they are in fact the adjoining owners in the proper sense of the term.

The proposition that although the land has not been offered to the Plaintiffs the sale ought not to be restrained, is one which this Court cannot entertain; that the railway company should put it up by auction, not offering it to the adjoining owners, and putting a condition in the particulars of sale that the purchaser shall not take that objection, cannot be allowed. How would the adjoining owners in that case be situated? They might be compelled to institute proceedings against a person who might claim to be a purchaser for value without notice; and though possibly he would not be able to sustain that defence, it might lead to a great amount of litigation, and the railway company would be giving apparent rights to other persons merely for the purpose of impeding the persons who are entitled to buy the land.

The only objection which from the beginning appeared to me to have any substance in it, was that derived from the words "used for building purposes;" because, certainly, this land is in the neighbourhood of a very populous district, where a great many buildings exist. The words of exception in the 128th section are these: "unless such land be situated within a town, or be lands built upon, or used for building purposes." I had to consider that question very much in the case of Lord *Henry Seymour's* will (1), in which I had to define what the extent of *London* was within the meaning of his will. I am clearly of opinion that this is not in a town, and that it does not come within any definition of a town that can properly be made. Then, in the next place, it is not "built upon," that is certain. Then the only question is, whether it is used for building purposes. Now, I do not think that the meaning of those words, as used in this clause, is that the land is "fit to be used for building purposes," because if that were so, of course the railway company might prevent any adjoining owner in any place from purchasing the land by putting up a placard to say that they intended to use it for building purposes. I think that what the Act meant was this: where the houses are actually laid out, where the land has been sold as building land, or let upon building leases, though the houses are not actually built: that is what I think is meant by the words "or used for building purposes;" the land must be either built upon, or actually laid out to be used for building purposes. Without that the railway company could certainly very seriously inconvenience an owner, if they did not wish to sell the property to him, but wished to sell it by auction, thinking they could make more by selling it by auction than by the particular mode in which the value is to be ascertained when it is offered to an adjoining owner. It is obvious that an adjoining owner might wish to have the land for a purpose rather of fancy than of use for himself; as for instance, to lay it

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(1) *Wallace* v. *Attorney-General*, 33 Beav. 384.

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out in gardens, to prevent buildings being erected opposite his own house, to enable him to retain the view, and the like; for all those purposes the property might be of greater value to the adjoining owner than it would be to any stranger; and if a stranger purchased it he might use it for building or other purposes, which might be detrimental to the adjoining owner. I think this clause only intended to except cases where the buildings were actually made or actually in progress, or the land actually laid out for that purpose, and that therefore it does not apply to the present case, and the Plaintiff is entitled to the decree which he asks.

Mr. *Baggallay*:—According to the terms of the injunction prayed for, each of the Plaintiffs will have a right of pre-emption over the whole land.

Lord Romilly, M.R.:—I think that is right. It is one piece of land, not divided by any fence. There must be a perpetual injunction in the terms of the prayer of the bill, and the Defendants must pay the costs.

Solicitor for the Plaintiffs: Mr. *J. A. Rose*.
Solicitor for the Defendants: Mr. *Faithfull*.

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Dec. 14, 18.

In re LITTLEHAMPTON, HAVRE, AND HONFLEUR STEAMSHIP COMPANY.

ORMEROD'S CASE.

Company—Winding-up—Contributory—Scripholder.

9 Eq 238

The articles of association of a limited company formed under the *Companies Act*, 1862, provided that the directors instead of entering allottees of shares on the register of members, might issue to them scrip certificates entitling the holders to the shares therein named, subject to the payment of the instalments at the times therein mentioned, that the word "shareholder" should include scripholder, that the shares for which scrip was issued should be transferable by delivery of the scrip, and the holder of the scrip should be the only person recognised as entitled to the shares, and that the scripholder on surrendering his scrip should be entitled to be entered on the register of members in respect of the shares mentioned in the scrip certificate. The company being wound up:—

Held, that a scripholder was not a contributory.

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Ormerod's Case.

THIS was an application by the official liquidator of the *Littlehampton, Havre, & Honfleur Steamship Company, Limited,* that *H. E. Ormerod* might be placed on the list of contributories in respect of 100 shares.

The company was formed and registered under the *Companies Act*, 1862, in June, 1863, as a limited company, with a nominal capital of £150,000, divided into 15,000 shares of £10 each.

The articles of association provided (s. 4), that any person having signed an application for shares in such form as the directors should determine, should be deemed to have agreed to become a member of the company; (s. 8), that the directors might, instead of entering the name of the applicant or allottee on the register of members, issue to him, on such terms and conditions as they might think fit, a provisional scrip certificate under the common seal of the company, entitling the holder thereof to the share or shares therein named, subject to the payment of the several instalments and at the several times mentioned in such provisional scrip certificate; (s. 9), that the payment of the several instalments should be made at the registered office of the company on the days on which they should respectively fall due; (s. 11), that so soon as all instalments should have been paid on any provisional scrip certificate, the company might issue in exchange for the same a full scrip certificate, declaring the holder thereof to be the proprietor of the fully paid-up shares therein named; (s. 12), that the company should keep a register, to be called the scrip register, in which should be entered the numbers of all shares for which scrip certificates had been issued, and the numbers of the corresponding scrip certificate; (s. 13), that the holder of any provisional or full scrip certificate for the time being in force should, on surrendering his scrip certificate, accompanied by a request in writing to that effect signed by him, on payment of a fee not exceeding 2*s.* 6*d.*, be entitled to be entered on the register of members in respect of the shares in such scrip certificate mentioned, and such shares should thereupon be removed from the scrip register and entered on the register of members in the name of the person making such request; (s. 21), that all shares for which provisional or full scrip certificates should have been issued should be transferred by the simple delivery of such certificates, and the holder of any such certificate should be the only person recognised by the company as having any right or title to the shares therein named; (s. 33) that if default should be made in payment of any instalment on any provisional scrip certificate such provisional scrip certificate should thereupon become void, and all shares in respect of which such default should be made should be absolutely forfeited to the company; (s. 68) that at general meetings every shareholder should have a certain number of votes, according to the number of his shares; (s. 73) that scripholders on depositing their scrip certificates at the company's office seventy-two hours before a general meeting should receive vouchers entitling them to vote at such meeting, and on giving up the vouchers should be entitled to receive back the scrip certificates; (s. 3) that the word "shareholder" should include scripholders as well as members.

In November, 1863, *Ormerod,* who was one of the original directors appointed by the articles, applied in writing for 100 shares in the following terms:—

> "I request you to allot to me 100 shares in the above-named company, and I agree to accept the same, or any less number, subject to the regulations of the company, and to pay the deposit of £1 per share on allotment; and I hereby authorize you to enter my name on the register of the company for the said number of shares so allotted to me."

A hundred shares were allotted to him, and he paid a deposit of £1 per share to the company's bankers. His name was entered on the register of members for ten shares only, and for the remaining ninety he received provisional scrip certificates, declaring the holder entitled to the shares therein numbered, subject to the payment of such instalments as should from time to time be notified by advertisement in the *Times* newspaper.

In January, 1865, a Petition to wind up the company was presented by *Ellis,* a holder by delivery of a provisional scrip certificate, and was opposed, on the ground that the Petitioner was not a contributory; but a winding-up order was made by the Master of the Rolls (1), and affirmed on appeal by the Lords Justices (*dissentiente* Lord Justice *Turner*) (2), upon the Petitioner admitting his liability as a contributory, and undertaking to do all acts necessary to constitute himself a legal shareholder.

In November, 1866, one *Gregg*, who had been placed on the list of contributories, applied to have his name removed, on the ground that he was a scripholder, and not a member; he had applied for shares and had received a notice from the company that he might have scrip certificates for the shares allotted to him; but he did not obtain the certificates, and the directors subsequently entered his name on the register of members. The Master of the Rolls held that he was a shareholder, and not a scripholder, and refused the application.

Ormerod contended that he was a contributory for ten shares only. He alleged that he had transferred his scrip; but the *bona fides* of the transfer was disputed by the official liquidators.

Mr. *Jessel*, Q.C., and Mr. *T. A. Roberts*, for the official liquidator:—

Under the articles of association of this company *Ormerod*, as an original holder of provisional scrip certificates, is liable to contribute to the assets of the company to the extent of the amount unpaid on the shares named in his scrip certificates. By his application for shares he agreed to become a member of the company, and he is consequently bound by the articles, which require him to pay the instalments from time to time to be called up on the ninety shares; though the scrip certificates are transferable by delivery, they can only be transferred subject to the payment of the instalments or calls payable on the shares, and the original holder remains liable to the company for the payment of such instalments until the transferee has done some act to take upon himself that liability as between him and the company. But if, upon the true construction of the articles, a scripholder is not thereby made liable to contribute to the assets of the company, the provisions of the articles which purport to relieve him from that liability are contrary to the *Companies Act*, 1862, under which this company was formed. In order to enable persons dealing with limited companies to know to what they have to trust, the

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(1) 34 Beav. 256. (2) 2 D. J. & S. 521. 11 Jur NS 211.

Act requires such companies to specify in their memorandum of association the amount of their nominal capital, and does not allow them afterwards to diminish that capital, or even to modify it by increasing the number and diminishing the amount of the shares: *Feiling's and Rimington's Case* (1); and it would be a gross evasion of that provision of the Act for a company to issue its shares in such a manner as to relieve the holders from liability to contribute the unpaid amount of their shares. The scripholders in this company are expressly declared to be shareholders, and are entitled to vote at meetings, and to share in the dividends and profits of the company, and may at any time be registered as members of the company. They are, therefore, to all intents and purposes, shareholders, and no agreement between them and the company can release them from the statutory liability of shareholders. There can be no such thing as a share in a limited company, under the *Companies Act*, 1862, the unpaid amount of which no one is liable to pay, and as it has been held in *In re Littlehampton Steamship Company* (2) that a transferee of scrip in this company is not liable, it follows that the original allottee is liable. In *Gregg's Case, Gregg* was a registered shareholder, and it was unnecessary to decide the question of the liability of scripholders. The *onus* is upon the Respondent to shew that he has got rid of his liability by a *bonâ fide* transfer of the scrip, with the intention of actually passing the ownership of the shares to a transferee, who has made himself legally liable to the company: *Hyam's Case* (3); *De Pass's Case* (4); and upon the evidence we submit that he has failed to do so.

Mr. *Roxburgh*, Q.C., and Mr. *Lindley*, for *Ormerod*, after referring to *Gregg's Case* were stopped by the Court.

Lord Romilly, M.R.:—

I consider that I have already decided this question. The articles of association make a clear distinction between scripholders and members of the company. Mr. *Ormerod* applied for a hundred shares, and the directors might have registered him as a

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(1) Law Rep. 2 Ch. 714.

(2) 34 Beav. 256; 2 D. J. & S. 521. 11 Jur N.S. 211.

(3) 1 D. F. & J. 75. 6 Jur N.S

(4) 4 De G. & J. 544. 5 Jur N

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member in respect of a hundred shares, but they chose to register him in respect of ten shares only, and to give him scrip in respect of the other ninety shares. He is, therefore, a member of the company in respect of ten shares only, and can only be made a contributory in respect of those ten shares. Mr. *Ormerod*, as well as the official liquidator, must have his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Lewis & Lewis.*
Solicitors for the Respondent: Messrs. *Cowdell & Grundy.*

EARL POULETT *v.* HOOD.

M. R. 1868 Jan. 20.

Conveyance—Sale by Trustees by Direction of Tenant for Life—Covenants for Title—Freehold Lands of Manor—Production of Court Rolls.

Where trustees of a settlement of real estate are empowered to sell by the direction of the tenant for life, upon a sale in pursuance of the power the tenant for life must enter into the ordinary covenants for title.

A lord of a manor selling freehold lands of the manor subject to leases for lives granted by copy of Court roll must covenant to produce the Court rolls up to the date of the conveyance.

BY a settlement made in 1813, the *Poulett* family estates were vested in trustees for a term of 1200 years, upon trust to raise the sum of £20,000 by way of portions for the younger children of *John*, late Earl *Poulett*, by *Charlotte Fanny*, Countess *Poulett.*

There were two younger children who attained vested interests in the £20,000; but they both died intestate in the lifetime of their father, who thus became entitled to the whole of the sum. He died in 1864, having, by his will, bequeathed his residuary personal estate to the Plaintiff, the present Earl *Poulett.* The suit was instituted for the administration of *John* Earl *Poulett's* estate, and by an order made therein the sum of £20,000, and interest, was directed to be raised by a sale of a competent portion of the hereditaments subject to the term of 1200 years.

Under a settlement made in 1853, the family estates (subject to the term of 1200 years) now stood limited to the present

Earl *Poulett* for life, with divers remainders over; and there was therein contained a power for certain trustees, by the direction of the tenant for life, to sell and convey any part of such estates.

When the sale directed by the Court came to be carried out, it was considered more advantageous that the fee should be sold under the power in the settlement of 1853, and an application was made under *Lord St. Leonards' Act*, with the view of obtaining the opinion of the Court whether the trustees of that settlement might properly concur in the sale. The Court being of opinion that they might, the fee of part of the settled estates was sold accordingly. To a conveyance tendered by the purchaser, Earl *Poulett* made two objections, which were now brought before the Court on a summons adjourned from Chambers.

The first was, that Earl *Poulett*, although only tenant for life, was made to enter into the usual covenants for title.

The second arose in this way: Part of the property sold was freehold of the manor of *Chard*. The manor was subject to the settlements, and under powers contained in them the successive tenants for life had granted, by copy of Court roll, leases for lives of the hereditaments in question. The property was sold subject to these leases, and the purchaser claimed to be entitled to a covenant for the production of the Court rolls prior to the date of the conveyance. To this Earl *Poulett* objected.

Mr. *W. W. Cooper*, for the purchaser:—

As to the first objection: where a sale is made by trustees by the direction of the tenant for life, it is the invariable practice that the tenant for life should enter into the ordinary covenants for title: *Sugden's* Vendors and Purchasers (1); *In re London Bridge Acts* (2).

As to the second objection: the tenants of the property we have purchased hold by copy of Court roll. The Court rolls, therefore, stand in the place of counterparts of ordinary leases, which would be delivered up to a purchaser. As the Court rolls cannot be delivered up, there ought to be a covenant to produce them.

(1) 14th Ed. p. 575.

(2) 13 Sim. 176.

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Mr. *Faber*, for Earl *Poulett*:—

As to the first point: this is substantially a sale by the Court; and it is established that upon a sale by trustees under the direction of the Court the *cestui que trust* is not required to covenant for title: *Cottrell* v. *Cottrell* (1).

As to the second point: by the sale the property sold ceases to be part of the manor; and if it ceases to be so connected with the manor the purchaser, who has not bought the copyhold interest, can have no right to inspect the Court rolls. Besides, the Earl is only tenant for life, and cannot bind those in remainder by his covenant.

LORD ROMILLY, M.R.:—

I am of opinion that Earl *Poulett* must covenant for title. This is not a sale under the decree of the Court, although, unquestionably, it is very like it. The Court ordered the term to be sold; but then Earl *Poulett*, finding that a sale of the term was not so advantageous, chose, instead of that, to sell under the power. Taking that course he must take it with all the incidents, and one of these is, that the tenant for life must covenant for title.

As to the second point: the Earl must clearly covenant for himself and those claiming under him to produce the Court rolls to the purchaser.

Solicitors: Messrs. *Slater & Dommett;* Mr. *Annesley*.

(1) Law Rep. 2 Eq. 330. 12 Jur. N.S. 285.

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Jan. 22, 23.

In re CANADIAN NATIVE OIL COMPANY.

FOX'S CASE.

Winding-up—Contributory—Misrepresentation—Return of Deposit—Laches.

6 Eq. 11, -4,
4 Ch 101
5 Ch 189
3 C.D. 414 - 9
420, -4-7
428, 437.

A shareholder in a company, being in a position to file a bill against the company to have his name removed from the register, wrote to the secretary declining to have anything further to do with the company, and requesting that his deposit might be returned. The deposit was returned, but his name remained on the register of shareholders. Eighteen months afterwards the company was ordered to be wound up:—

Held, that he was not a contributory.

THE *Canadian Native Oil Company, Limited*, was incorporated in July, 1862, under a memorandum of association by which the objects of the company were defined to be "the acquisition of land in the oil districts of *Canada;* the collection and purchase of the native or petroleum oil; the providing the means of transport thereof; the purchasing, hiring, and erecting factories, premises, machinery, and appliances for the storing, refining, manufacturing, and preparing for sale such native or petroleum oil and the products thereof, and the sale thereof; and also the carrying on other operations connected with or conducive to any such objects." The prospectus of the company, which was issued about the same time contained the following passages:—

"The oil deposits of *Canada*, like the coal strata of *England*, are confined to certain localities, which it is assumed will yield supplies for ages, consequently the first consideration of this company was to secure large tracts of land in the counties of *Enniskillen*, *Brooke*, and *Sombra* (together an aggregate of about 4000 acres), the region in which the chief discoveries have hitherto been made. The low creek lands throughout the whole of these tracts have geological indications of oil, and the surface is useful as farming land, while a portion is covered with oak timber of great value, which is now used for making the casks in which the oil is shipped." "Upon a portion of the lands secured by this company, a well has already been sunk to the depth of more than 150 feet, when oil was discovered."

On the 9th of July, 1862, Mr. *Fox* took twenty shares and paid the deposit thereon.

On the 14th of November, 1862, the directors of the company issued a report, which stated that in delaying their report until that period they had been actuated by two motives:—first, the difficulty of procuring a site for buildings requisite for refining operations and the storage of oil; secondly, "from the time necessarily occupied in the inquiries of special commissioners sent out to *Canada* by your board to examine the lands purchased by your company, under arrangements stated in the prospectus, as well as to ascertain, by personal inspection on the spot, the condition of the oil springs, the prospect of a future supply, and the certainty of its continuance." It then stated that a site for the buildings had been "secured" at *Gravesend*, and extracts from the report of the special commissioners on the lands in *Canada* were given. It then proceeded as follows:—

"The purchase of these lands has been effected, and directions have been sent out for the immediate dispatch of cargoes of oil to be delivered for refining at the company's premises, which will be ready on their arrival."

On the 20th of November, *Fox* took 100 additional shares.

On the 3rd of January, 1863, the directors issued another report, stating that particular circumstances of recent occurrence had induced them to "refrain from absolutely completing their intended purchase of lands in the vicinity of *Enniskillen*;" that the purchase of lands was not indispensable for the purposes of the company, and ought to be dispensed with; and that the operations of the company ought, for the present, to be confined to purchasing oil from the well-owners and refining it on the premises at *Gravesend.* For this purpose the directors proposed to reorganize the company with a smaller capital, and they requested the shareholders to authorize the transfer of their deposit and subscription to the reorganized company. On the 13th of January *Fox* wrote a letter to the secretary, declining to have anything further to do with the company, and requesting that his deposit might be returned. On the 28th of January the deposit was returned accordingly: but his name was not removed from the register of

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shareholders. It did not appear that *Fox* knew that his name remained on the register.

By the articles of association the directors had all powers which could be exercised by the company in general meeting, but they were not expressly empowered to compromise disputes.

The directors did not succeed in forming the proposed new company, and in June, 1864, the original company was ordered to be wound up.

Fox's name was put on the list of contributories, and he now applied that it might be removed therefrom.

It appeared that the company had actually purchased and obtained a conveyance of the lands at *Gravesend* mentioned in the report of November, 1862; but that with respect to the lands in *Canada*, they had only entered into an agreement for the purchase thereof from one of the promoters, who was not the actual owner, but had himself only a contract for the sale of them to him by the proprietor.

Mr. *Jessel*, Q.C., and Mr. *Lindley*, for Mr. *Fox*:—

[The first ground submitted by them in support of the application was that the register of shareholders kept by the company did not satisfy the requirements of the *Companies Acts*, but as nothing ultimately turned on this, it is not considered necessary to report this part of their argument.]

The prospectus contains a material misrepresentation. The directors state that they have "secured" land in *Canada;* that must mean "purchased:" and in the report of November, 1862, they speak of such land as "purchased." From the report of January, 1863, it appeared that this was untrue; and this would have entitled Mr. *Fox* to file a bill to have his name removed from the register, and to obtain a return of his deposit: *Central Railway of Venezuela* v. *Kisch* (1); *Smith* v. *Reese River Company* (2); *Smith's Case* (3). That being so, he applies to the directors for a return of his deposit, and they comply with his request. By the articles of association of the company the directors were entrusted with all powers which the company in general meeting might

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(1) Law Rep. 2 H. L. 99.

(2) Law Rep. 2 Eq. 264; 12 Jur NS

(3) Law Rep. 2 Ch. 604.

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exercise. One of these powers must be a power to compromise disputes, and having chosen to settle the matter, instead of going to law, the company cannot now turn round and insist on Mr. *Fox* being placed on the list, especially where, by the lapse of time, the parties can no longer be placed in the situation in which they stood in January, 1863: *Lord Belhaven's Case* (1).

Mr. *Everitt* and Mr. *F. A. Lewin*, for the official liquidator:—

Mr. *Fox* did not retire from the company on the ground that misrepresentations had been made to him. He simply refused to join the new company, and to transfer his deposit: and his deposit was returned to him. That does not amount to cancelling the contract he entered into on becoming a member of the old company. Even if it did, the directors had no power to cancel the contract, as the articles of association do not empower them to compromise disputes; this distinguishes the present case from *Lord Belhaven's Case*. Mr. *Fox*, therefore, cannot be allowed to retire and carry away with him a portion of the capital of the company.

Jan. 23. LORD ROMILLY, M.R.:—

In this case I have come to the conclusion that Mr. *Fox* is not a contributory of the company.

The facts upon which I proceed are as follows: that, in fact, the total object of the scheme of the company was changed, that as soon as Mr. *Fox* was informed of the change he declined to have anything more to do with the company, and that thereupon he demanded a return of his deposit, a return of the deposit was made, and a year and a half after that the company was wound up.

[His Lordship then stated the facts above-mentioned, down to the issue of the report of January, 1863, and continued.]

I am of opinion that this is a most material change that takes place in the company, a much more material change, I think, than that which occurred in the *Reese River Company*, which the Lords Justices thought was quite sufficient to justify a person in retiring from it. In that case it appeared that the mines which

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(1) 3 D. J. & S. 41; 11 Jur NS 572

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the company had intended to take were worth nothing, and they had got rid of the bargain and had taken other mines some distance off, but in the same district; they had not altered the character of the company, but here the entire character of the company is altered—it was a company formed for one purpose, and now it becomes a company for another purpose. Then, on the 13th of January, ten days after this report, Mr. *Fox* applies for the return of the deposit; and on the 28th of January the return of the deposit is made. The winding-up order was made on the 18th of June, 1864, that is to say, one year and five months after this had taken place. If I hold Mr. *Fox* to be a shareholder of the company how can I put him in the same situation as he was in in January? The company had agreed to get rid of him altogether; and if they had not done so, why am I not to assume he would have taken steps to get rid of the contract, and have filed a bill for that purpose? If he had done so, and there was nothing more in the case than now appears, according to all the authorities he would have been entitled to be discharged from the company. Then the attempt to establish the new company failed, and thereupon they wound up the old one. There was pressed upon me very strongly this species of argument, that Mr. *Fox* is taking away part of the capital of the company, and is depriving the other shareholders of that which really is the capital of the company; but the answer to that is this, why did not the other shareholders do the same thing which he did? Why did they not say at once—return our deposit? If they had done so the company would have been wound up seventeen months sooner, and the probability is, that there would have been a much larger quantity of assets to be divided amongst them. It is to be assumed that the others did not intend to take advantage of this defect, which was so manifest; that they waited to see what would take place, just as in the *Venezuela Company's Case*, where some of the parties waited to see what the result of the litigation was, and then the Court said you are too late to do now what you might have done if you had come in proper time. This gentleman did not do so, he at once required his deposit to be returned, and, in my opinion, he was entitled to have it returned, that is to say, he was entitled to be discharged from the company and entitled to take his aliquot part of the assets, while the others elected to go on; I think it therefore follows that he is not a contributory of the company, and ought not to be placed upon the list.

Solicitors: Messrs. *Ashurst, Morris & Co.;* Messrs. *H. & S. R. Lewin.*

HILLS *v.* SPRINGETT.

M. R.
1867
Dec. 19.
1868
Jan. 13.

Practice—Order of Revivor and Supplement—15 & 16 *Vict.* c. 86, s. 52—"*Change or Transmission of Interest.*"

An order of course of revivor and supplement, under sect. 52 of 15 & 16 Vict. c. 86, cannot be obtained on the ground that the suit has become "defective by reason of some change or transmission of interest or liability," when, in consequence of the death of a Plaintiff or Defendant, a fresh interest has arisen in another person, not a party to the suit, and when there is no privity between the party who has died and the person, not a party, who so succeeds.

Accordingly, where, after decree in an administration suit, a Defendant died who if she had lived would have been entitled equally with the Plaintiff to the residue of the testator's estate, but on whose death the Plaintiff's interest became limited under the will to a specific sum, and the surplus devolved on a class of persons not claiming under the Defendant, and who were not parties to the suit:—

Held, that an order of course of revivor and supplement obtained by the Plaintiff under sect. 52 was irregular, and that the persons whose interest had arisen must be brought before the Court by an original bill.

THIS was a motion to discharge an order of revivor and supplement obtained by the Plaintiff after decree under the following circumstances:—

The suit was instituted for the administration of the real and personal estate of *Richard White*, a deceased testator.

The testator by his will gave his real and personal property to trustees, in trust to sell and invest and hold the trust property upon trust for his three grandchildren who should survive their father, *Robert Hills*, and attain twenty-five, equally. If only one should survive her father and attain twenty-five, then the whole was to be in trust for that one grandchild. And he further declared, that if two of the three grandchildren should die before their father, or under twenty-five, and if the amount of property to which the surviving grandchild would thereupon become entitled should exceed £10,000, then that the surplus above that sum was to be held in trust for the persons, other than the surviving grandchild, who would have been his next of kin according to the statute if he had died at the time of the death of the survivor of the two deceased grandchildren.

The testator died, leaving the three grandchildren surviving him. Their father, *Robert Hills*, pre-deceased the testator.

One of the grandchildren died under twenty-five, in July, 1865. *Mary Hills*, who was another grandchild, filed her bill in July, 1866, for the administration of the testator's estate, against the surviving trustee, and her sister, *Ellen Hills*, who was the third grandchild, as Defendants. The Plaintiff married, pending the suit, *Philip Eagles*, who, by an order of revivor, was made co-Plaintiff.

The decree was made on the 13th of February, 1867, directing the usual accounts and inquiries, and the appointment of a new trustee.

On the 12th of September, 1867, *Ellen Hills* died under twenty-five, and the Plaintiff, *Mary Eagles*, became the only surviving grandchild, and under the proviso in the will her interest in the testator's property was limited to the sum of £10,000, and the surplus devolved on the persons, other than the Plaintiff, who would have been the next of kin of the testator if he had died on the 12th day of September, 1867,—the day of the decease of *Ellen Hills*.

Soon afterwards a bill was filed by the persons who alleged that they were such next of kin, against the trustees of the will and Mr. and Mrs. *Eagles*, praying the administration of the real and personal estate of the testator so far as it remained unadministered, and asking that the rights and interests of all persons entitled under the will should be ascertained, and for an inquiry who were the persons entitled under the trusts of the will to the surplus exceeding £10,000.

On the 7th of November the Plaintiffs in the first suit obtained an order of course, stating the decree of the 13th of February, 1867, the death of the Defendant *Ellen Hills*, and that on her death certain persons therein named (who were the Plaintiffs in the second suit), were the only next of kin of the testator living at the death of *Ellen Hills*; and it prayed, and it was thereby ordered, that the suit and the proceedings thereunder should stand revived as against the said persons, and be in the same plight and condition as the same were in at the time of the abatement, and that the decree of the 13th of February, 1867, and the accounts and inquiries thereby directed, should be carried on and prosecuted between the Plaintiffs and the said persons in like manner as by the decree was directed between the Plaintiffs and the parties who were then Defendants.

The present motion to discharge the order of course was made in behalf of those persons who were the Plaintiffs in the second suit.

Mr. *Southgate*, Q.C., and Mr. *Villiers*, in support of the application:—

This order, which is the common order to revive, following the second form in *Seton* on Decrees (1), is irregular. The persons for whom we appear do not represent the deceased grandchild *Ellen Hills*, and though their interest has arisen, under the proviso in the will, upon her death, they do not claim through her, and cannot be brought before the Court in the first suit except by an original bill. The death of *Ellen Hills* did not cause any abatement in the suit: it only rendered it defective. Under the old practice these parties could only have been brought before the Court by an original bill in the nature of a supplemental bill, as a bill of revivor could not have been filed. The rule is thus laid down in *Mitford* on Pleading (2): "If the interest of a Plaintiff or Defendant suing or defending in his own right wholly determines, and the same property becomes vested in another person not claiming under him, the suit cannot be continued by a bill of revivor." The only exception appears to have been in the case of the death of a Defendant who was tenant in tail, when the suit could be revived against the next tenant in tail: *Lloyd* v. *Johnes* (3), referred to in *Daniell's* Chancery Practice (4). This being so, it is not a case in which the order can now be obtained under sect. 52 of the statute.

(1) 3rd Ed. p. 1164.
(2) 5th Ed. p. 86.
(3) 9 Ves. 37, 58.
(4) 4th Ed. p. 1397.

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This order cannot be supported by the present practice of the Court. In *Williams* v. *Jackson* (1), where a Defendant died before appearance, having devised his interest in land, the subject of the suit, to a co-Defendant, it was held by Vice-Chancellor *Wood* that a supplemental order could not be obtained, but that a supplemental bill must be filed. So in *Brooke* v. *Brooke* (2), where a sole Plaintiff in a supplemental suit died, Vice-Chancellor *Kindersley* refused to make a supplemental order, holding a supplemental bill to be necessary. In *Watts* v. *Watts* (3) the Plaintiff was tenant for life, with contingent remainders to his children, with remainder to a Defendant for life, with contingent remainder to his first son who should attain the age of twenty-one and survive him. After the bill was filed, and before decree, the Defendant's eldest son was born: after decree the Plaintiff died, without having had any issue. It was there held by Vice-Chancellor *Wood* that as the whole interest of the Plaintiff was absolutely determined, no order of revivor could be obtained by the Defendant's infant son, but that a bill must be filed in the nature of a bill of revivor and supplement. On the same principle, where a Defendant died before appearance, your Lordship held, in *Bland* v. *Davison* (4), that the suit could not be revived against his heir.

It is true that in some of the more recent cases under the statute a more liberal construction has been put upon the 52nd section than before, but none have gone to the length of supporting such an order as the one in question, the effect of which would be to give to a specific legatee the whole conduct of a suit against persons who do not claim under any deceased party to the suit, and who are now the residuary legatees, and can get no relief except in the second suit in which they are Plaintiffs.

Mr. *Jessel*, Q.C., and Mr. *Casson*, for the Plaintiffs in the first suit:—

The next of kin have filed their bill without giving notice to the Plaintiffs in the first suit, which they have no right to do after decree. The order complained of is regular, and sanctioned by the practice of the Court. After the passing of the *Chancery Improve-*

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(1) 5 Jur. (N.S.) 264.

(2) 9 W. R. 804.

(3) Joh. 631.

(4) 21 Beav. 312.

ment Act it was at first doubted whether the devisee of a deceased Plaintiff, who, under the old practice, could not revive without filing an original bill, was entitled to an order under the 52nd section. The question came before your Lordship, and subsequently before the Lords Justices, in *Eyre* v. *Brett* (1), where a sole Plaintiff had died before decree having devised real estate to *A.* and *B.*, whom he appointed his executors, and it was held that an enlarged construction should be put upon the Act, and that they were entitled to an order of revivor and supplement. This has been followed in subsequent cases. In a recent case of *Hobson* v. *Shearwood* (2), before your Lordship, the same liberal construction was put upon the Act. There, after decree, the sole Plaintiff in a suit, who was devisee under a will, married, whereby all his interest in the suit determined, and your Lordship considered that the 52nd section ought to be extended as far as possible, and that an order of revivor might be obtained. In *Colyer* v. *Colyer* (3) the Lords Justices held that where a sole Plaintiff died the suit might be revived after decree without bill filed.

Mr. *Southgate*, in reply.

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Jan. 13. LORD ROMILLY, M.R., after stating the facts, continued :—

If this order of revivor and supplement can be maintained, it must be under the 52nd section of the *Chancery Improvement Act*, 15 & 16 Vict. c. 86.

A great number of authorities were cited to me on both sides, all of which, with others (4), I have carefully read and considered, but

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(1) 6 N. R. 57, 191.

(2) 15 W. R. 887. 24 L.J. 121. MR

(3) Law Rep. 1 Ch. 482.

(4) Besides the cases cited, the following were considered by his Lordship before disposing of the case :—

Morritt v. *Walton* (2 W. R. 544), where, after decree, an order to revive was held by Vice-Chancellor *Kindersley* to be properly made on the death of a sole Plaintiff not a devisee of real estate.

Rudge v. *Weedon* (7 W. R. 519), 5 Jur NS 380 where a married woman, who had obtained a protection order under the *Divorce Act*, was made a Defendant to a suit as a *feme sole*, and her husband afterwards obtained a reversal of the protection order, whereupon the Plaintiff, after decree, obtained a supplemental order making the husband a Defendant—it was held by the Lords Justices that the order was regular. (4 DeG & J. 216. 5 Jur NS 723. *Lowe* v. *Watson*

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no one of them appears to me to apply to or to govern this case. Those cases originally were very conflicting; that conflict has been in a great measure removed by the latest decisions, and the result appears to me to have settled down to this, that, whether before or after decree, if a sole Plaintiff dies, or if a Defendant dies, and the interest of the person so dying goes over to another or others, such person or persons may be made parties to the original suit by an order of course for the revivor of that suit, reserving, however, in the case of a sole Plaintiff, the right of any persons to contest the title of the person to revive the suit. And this may be done on a motion to discharge the order. This principle seems now to have been carried to its fullest extent in the case of *Hobson* v. *Shearwood*, which is a decision of mine, and which, on reflection, I think is correct, though it certainly goes beyond anything that I have found in the other cases; but it does not govern the present case. In that case the widower, by marrying again, ceased to have any interest in the property administered, which thereupon went to others not deriving it through him, but then his interest went over to other persons who were already parties to the suit, and only caused an accretion to their existing interests, and no new inquiries or accounts were required in consequence of it.

But in this case a totally different state of things arises. The interest springs up in a class of persons who before had no interest at all, and who claim nothing through any deceased party to the suit. It becomes, therefore, necessary to look at the clause in the statute, and see whether the words of it apply to this case.

The 52nd section provides, that "upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplement, ... but an order to the effect of the usual order to revive, or of the usual supplemental decree, may be obtained as of course upon an alle-

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(1 Sm. & Giff. 123), where Vice-Chancellor *Stuart* held that a devise by a Defendant was a "transmission of interest" under the 52nd section. *Dendy* v. *Dendy* (5 W. R. 221), where Vice-Chancellor *Wood* considered that it did not apply to the case of a devise by a sole Plaintiff. *Jackson* v. *Ward* (1 Giff. 30), where a sole Plaintiff died after decree, Vice-Chancellor *Stuart* held that a supplemental order could be made.

gation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability." In order, therefore, to obtain the benefit of this clause, defect must arise "by reason of some change or transmission of interest or liability." I think that means that the particular interest which was vested in one person on his death goes to another, or that the particular liability which attached to one person upon his death attaches to another. Thus, for instance, if the residuary devisee or legatee of a testator files a bill to administer the estate of his testator and pending the suit he dies, leaving all his property to *A.*, then *A.* stands in the place of the original Plaintiff, and can revive the suit, whether before or after decree.

But I think that the clause does not apply, and was not intended to apply, to a case where, in consequence of the death of a Plaintiff or Defendant, a fresh and distinct interest, not previously existing, arises in another person, who was not a party to the original suit, and up to that time was in no way interested in it. In one sense, unquestionably, it is a change of interest, because there is an estate or a sum of money which before the death of the Plaintiff or of the Defendant belonged to him, and which after the death belongs to another. But I think that is not the change of interest contemplated by the statute, which, in my opinion, applies only where there is some privity between the party to the suit who dies and the person, not a party, who succeeds.

If, however, the persons in whom the new interest arises be, as in the case of *Hobson* v. *Shearwood*, already parties to the suit, and effect can be given to their interests under the existing decree, then the suit may be set right by an order of course under the 52nd section.

But in this case it is quite otherwise. On the death of *Ellen Hills* the Plaintiff's interest is altered; instead of taking one-half she takes £10,000, and no more. If it stopped there this might be cured by the order of course; but the interest of *Ellen Hills* is transmitted to no one; it absolutely ceases and determines; no person claiming by, through, or under her takes anything, but a new class of persons springs up instead, namely, the persons other than the Plaintiff, Mrs. *Eagles*, who would have been the next of kin of the testator in case he had died simultaneously with *Ellen Hills* on the 12th of September, 1867.

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I am of opinion that to ascertain who these persons are requires a fresh bill, and that this inquiry cannot be worked out properly by adding to the present decree. It would, in my opinion, be contrary to all practice and precedent to add to a decree such as the present the inquiry which would be required to work out the relief proper for the altered circumstances of this case. It is, in fact, a separate and distinct suit, which has nothing in common with the first suit, except the accounts of the testator's estate and of the sums received by the trustee.

I am of opinion, therefore, that this order is not warranted by the statute and must be discharged, and that the costs must follow the event.

Solicitors: Messrs. *Parker, Lee, & Haddock*; Mr. *E. S. Cavell.*

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Jan. 27, 28, 29.

8 Eq. 171

Demurrer—Bill to rectify Bill of Exchange on which the Plaintiff has been suing at Law—Mistake—Legal Defence—Equitable Remedy.

Semble, a Plaintiff suing at law upon an instrument will not be allowed at law to adduce evidence to shew that the instrument does not correctly represent the agreement entered into.

A renewed bill of exchange was drawn out, with a blank for the drawer's name, by an agent of the Plaintiff, who, by mistake, inserted above the place where the drawer's name was afterwards inserted, the name of the Plaintiff, and the signatures of the drawer and acceptor were afterwards added, and the bill indorsed to the Plaintiff; Plaintiff sued the drawer at law, and on the Defendant pleading that the Plaintiff's name appeared as drawer of the bill, the Plaintiff filed a bill for rectification. To this a demurrer was overruled, on the double ground of the non-admissibility of evidence in an action by the Plaintiff at law to prove the real contract, and of the established jurisdiction in equity to correct mistakes in documents.

Observations on the proper course of procedure to remedy a mistake in a Plaintiff's document.

THIS was a demurrer.

The bill was filed by *Ann Druiff*, the widow and administratrix of *William Druiff*, late of *Newport*, *Monmouthshire*, pawnbroker, against Lord *Parker*, and alleged the following facts:—

In March, 1866, *William Druiff* made an advance to Lord *Parker* and *Frederick Granville* upon two bills of exchange for £500 each, dated the 14th of March, 1866, and payable three months after date to the drawer's order.

One bill was drawn by *Granville* upon Lord *Parker*, was accepted by him, and indorsed by *Granville* to *Druiff*; the other was drawn by Lord *Parker* upon *Granville*, accepted by him, and indorsed over by Lord *Parker* in like manner.

In April *William Druiff* died.

In June the bills were not paid at maturity, and were renewed and indorsed to the Plaintiff in precisely similar form to the first. In September they were again unpaid, and the bill alleged with respect to them as follows:—"But the same were, at the request of the Defendant and the said *Frederick Granville*, agreed to be renewed by the Plaintiff for the further period of three months. The

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two bills by which such renewal was to be effected were drawn out by the Plaintiff's daughter, with blanks for the signatures of the drawers thereof respectively; but she, by mistake or inadvertence, not being accustomed to such business matters, put the Plaintiff's name to each of the said bills in the place where the name of the drawer should have been signed; but in all other respects the said bills were similar to the other bills hereinbefore mentioned, and such new bills were then sent to the Defendant and the said *Frederick Granville* for their respective signatures and acceptances, and were signed and accepted by them respectively in a similar manner to the other bills hereinbefore mentioned."

The bill that was drawn by *Granville*, and accepted by Lord *Parker*, was dated the 14th of September. The other, dated the 25th of September, which was drawn by Lord *Parker*, accepted by *Granville*, and indorsed by Lord *Parker* to Mrs. *Druiff*, was the subject of the present suit. The following was the form:—

"£500. "*London*, Sept. 25th, 1866.

"Three months after date pay to my order five hundred pounds, value received.

Fck. Granville, Esq.,
Croft House,
Fairford."

A. Druiff.
Parker,
1st Life Guards."

Across it was written:

"Accepted; payable at Messrs. *Coutts, London.*

Fred. Granville."

The bill proceeded to allege as follows:—

"The said bills were drawn, and given by the Defendant and the said *Frederick Granville* to the Plaintiff, as security for the payment of the debt which they owed her, and it never was the intention of the Plaintiff, or of the Defendant, or of the said *Frederick Granville*, that the Plaintiff was to be liable as a drawer, nor, in fact, was she one of the drawers of the said bills, or either of them, and the Defendant never was misled by the signature of the Plaintiff on the said bills, or either of them, or thereby induced to believe, nor did he in fact ever believe, that the Plaintiff was one of the drawers thereof, or jointly liable with the person who drew the same and indorsed it to the Plaintiff; and the Plaintiff was not aware, until she received Messrs. *Cookson, Wainewright & Co.'s* letter on the 8th of March, 1867, hereinafter set forth, that it could be alleged and insisted, that the Defendant was not liable at law to the Plaintiff on the said bill of the 25th of September, 1866, because her name appeared thereon as hereinbefore stated."

When these bills fell due *Frederick Granville* was found to have left the country, and the Defendant, Lord *Parker*, was applied to on both. It was alleged that the Defendant had admitted in conversation, "I know I am liable, and I will pay the two bills; but I hope Mrs. *Druiff* will give me time. I will see my solicitors."

A correspondence ensued, and in a letter from the Defendant's solicitors to Mrs. *Druiff*, on the 8th of March, they said: "The bill" (that of the 25th of September) "having been drawn by you, it is quite clear that Lord *Parker* is not liable to you on this bill."

The Plaintiff, Mrs. *Druiff*, thereupon, on the 18th of May, commenced an action against the Defendant for recovery of the amount of the bill, declaring as upon an ordinary bill of exchange, and not making any statement as to the appearance, whether by accident or otherwise, of the Plaintiff's name on the bill as one of the drawers. To this the Defendant pleaded a plea (the seventh) which set out a copy of the bill exactly as it appeared, and then went on to aver: "And the Defendant says that the said *A. Druiff*, in the said bill mentioned as and being a drawer thereof, is the Plaintiff." To this the Plaintiff filed a replication and demurrer in the following terms:

"And for a second replication to the Defendant's seventh plea, the Plaintiff says that at the time of the drawing of the said bill in the said seventh plea mentioned, it was the intention of the Plaintiff and the Defendant that the same should be drawn by the Defendant alone, and indorsed by him to the Plaintiff as such administratrix as aforesaid. And the Plaintiff says that she did not draw the said bill, and that the said name, '*A. Druiff*,' mentioned in the said plea as and being a drawer of the said bill, was inserted in the same by mistake, and without the consent or authority of the Plaintiff, and the Defendant indorsed the said bill to the Plaintiff as such administratrix as aforesaid." On the 15th of June the Defendant joined issue.

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On the 12th of December Mrs. *Druiff* filed this bill, alleging, as above, that notice of trial had not yet been given in the action, and that she was advised, and charged it to be the fact, that her signature upon the bill of the 25th of September would embarrass, and probably defeat, her right at law to recover the amount of the bill and interest from the Defendant, and that she could not safely proceed to trial in the action while her signature remained on the bill.

The bill prayed that the bill of exchange of the 25th of September might be rectified by striking the name of the Plaintiff out of it, and that the Defendant might be restrained from alleging in the action, or at the trial, that the Plaintiff was jointly with himself, or otherwise, a drawer of the bill, and from issuing execution under any judgment he might obtain in the action without the leave of the Court.

The Defendant demurred for want of equity.

Mr. *G. M. Giffard*, Q.C., Mr. *Quain* Q.C. (of the common law bar), and Mr. *Montague Cookson*, for the demurrer:—

Every material statement in this bill might have been alleged by the Plaintiff in her replication; upon what principle, then, does she come into equity?

The theory upon which she proceeds is, that no evidence as to the true nature of the transaction between her and the Defendant can, at law, be given against the instrument on which she sues.

But is that theory correct? It may be admitted that where parties profess to contract, and do contract, in the terms of a certain instrument, evidence cannot be admitted at law to vary the terms of the contract. But where the question is, contract or no contract—whether or not there was a mistake—or whether or not the parties ever came together *animo contrahendi*, the rule of law is, that parol evidence is admissible: *Murray* v. *Earl of Stair* (1). *Wallis* v. *Littell* (2); *Pym* v. *Campbell* (3); *Rogers* v. *Hadley* (4); *Wake* v. *Harrop* (5). It follows that evidence of this mistake may have been given at law.

(1) 2 B. & C. 82.
(2) 11 C. B. (N. S.) 369; 8 Jur. N.S. 745.
(3) 6 E. & B. 370. 2 Jur. N.S. 16
(4) 2 H. & C. 227; 9 Jur. N.S. 9
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(5) 6 H. & N. 768; S. C. in error, 1 H. & C. 202; 7 Jur. N.S. 710; 8 Jur. N.S. 845.

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It is clear that the Plaintiff might have had full relief in equity; she is wrong therefore in seeking rectification in this Court as auxiliary to her relief at law: *Phelps* v. *Prothero* (1); *Evans* v. *Bremridge* (2). The same principle must apply, *à fortiori*, where there is a good defence at law: *Waterlow* v. *Bacon* (3); *Farebrother* v. *Welchman* (4).

Mr. *Amphlett*, Q.C., Mr. *Fischer*, and Mr. *Henry James* (of the common law bar), for the Plaintiff:—

If parol evidence be not admissible at law, we are without remedy except in this Court. But if it be admissible, and even if it should be shewn that Mrs. *Druiff's* name was inserted not by herself, but by her daughter by mistake, still the question remains whether the Defendant is bound by a document with that name upon it. If the Plaintiff should be non-suited in the action, and this demurrer should be allowed, the result would not be very creditable to the administration of justice.

That Mrs. *Druiff's* name was inserted by mistake is true in fact; and for what purpose was the seventh plea pleaded, except to embarrass and defeat the right of the Plaintiff? Our replication would be a perfect answer, if the rules of law permitted us to prove the facts. But would evidence be admissible? If not, the replication must fail.

[Reference was made to *Davies* v. *Stainbank* (5), and *Stewart* v. *Great Western Railway Company* (6).]

There is no doubt that one is entitled at common law to shew that the alleged agreement was entered into by fraudulent misrepresentation, or, as in *Pym* v. *Campbell* (7), that there was no concluded agreement at all. But those cases are not the present, which is that of a principal who admits having given authority to her agent to draw a bill of exchange, but is obliged to deny the agent's authority to enter into a part of the written contract. That is a position with which the other side have not attempted to deal. There is no power in Courts of law to rectify a contract as to part, and enforce it as to part. But that is what we desire to do.

(1) 7 D. M. & G. 722. 2 Jur NS 173.
(2) 8 Ibid. 100. 2 Jur NS 311
(3) Law Rep. 2 Eq. 514. 12 Jur NS 614
(4) 3 Drew. 122.
(5) 6 D. M. & G. 679, 690.
(6) 2 Dr. & Sm. 438.
(7) 6 E. & B. 370. 2 Jur NS 641

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The Defendant did not demur to the replication, consequently the whole question is open.

It is impossible for us to shew at law that the Plaintiff was not the drawer. It is because we cannot shew the real facts in the action, that we have filed this bill.

THE VICE-CHANCELLOR said he felt quite clear there could be no injunction, but what would the result be, if it should turn out that this evidence was inadmissible at law?

Mr. *Giffard*, in reply:—

The argument on the other side must go to this length, that if Lord *Parker* himself had put Mrs. *Druiff's* name on to this bill, that fact could not be pleaded at law.

The Plaintiff is proceeding upon that which, if her own allegation at law be true, was a complete and perfect contract. It rests upon us to shew that it was not. The instrument is produced, and the first thing to be shewn, would be, that this name was not in Mrs. *Druiff's* handwriting, and that her daughter was not her agent to write it. Then, I suppose, we should break down if we could not prove that the signature was the handwriting of Mrs. *Druiff*, or that it was the act of somebody who had her authority for signing. Then can it be said that it would not be open to Mrs. *Druiff* to shew, if she could, that she never gave authority for such an act, and that Lord *Parker* knew it?

In the case of *Stewart* v. *Great Western Railway Company* (1) it was held that the fraud was not such as a Court of law would necessarily deal with, and so the bill was allowed to proceed.

Jan. 29. SIR W. PAGE WOOD, V.C., after stating the facts, and observing that the Plaintiff in her declaration in the action had omitted to state the circumstance of her name appearing on the bill as drawer; also that the Defendant had not demurred to the Plaintiff's replication, but had joined issue on the facts as they appeared; continued:—

The circumstance that issue is joined is not material, because it

(1) 2 Dr. & Sm. 438.

is admitted that even after verdict there can be an arrest of judgment, if the plea which is set forth should turn out to be not a good plea.

If the case had rested wholly upon the question of whether this would be a good defence at law, I confess the situation of matters would not be extremely creditable to our administration of justice; inasmuch as I should be compelled to come to a decision upon what a Court of law would have to decide, or they would have to decide on what a Court of equity would decide on equitable pleas, instead of each Court having complete jurisdiction over the whole subject matter.

If I were compelled to decide this case upon the authorities which have been cited, especially that of *Wake* v. *Harrop* (1), I must say it appears to me pretty evident that a Court of law would not admit this species of defence.

The classes of authorities which have been cited by Mr. *Quain* are of two kinds. One is a class—where the instrument, as written and propounded, is admitted to be the instrument which, at some future time, is to be the agreement of the parties. No fault is found with the instrument; but it is said that it is not to come into effect, except conditionally, and that as the condition has not yet been fulfilled, no agreement has been come to between the parties. Courts of law, no doubt, have an increasing desire to do justice without sending parties to another jurisdiction, and there is some degree of refinement in this view of theirs, because it might have been said: "If the agreement is to be conditional, the condition should have been expressed in the agreement itself." But that has been got over, and it has been held that, just as a Defendant, pleading that an instrument is not a deed as it appears to be, but only an escrow, is at liberty to bring evidence to prove an agreement that it should remain in another's possession until a certain period had arrived—so in the same way a person claiming the benefit of an agreement is bound to meet the averment that the agreement was conditional only, and that the condition not having been performed, the negotiation has not yet ripened into a contract.

The other class of authorities is of this kind—where a Defendant

(1) 6 H. & N. 768; 1 H. & C. 202.
7 Jur N.S. 710 – 8 Jur N.S. 845.

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has been allowed to say: "This document which you produce against me, shewing my signature to it, does not express the real and true agreement which was entered into between us." Cases there are in which a plea of this kind has been allowed, even at law. But it is to be observed that all these were cases of a Defendant defending himself. No single instance has been produced in which a Plaintiff, bringing forward a document on which he founds his right, has been allowed to say that the instrument which he himself produces to the Court does not express the real agreement into which he has entered.

That is really the present case, as the averments shew. What the Plaintiff says, in substance, is:—"The insertion of my name was an accident," resembling the case which was put by way of illustration by Bramwell, B., in *Wake* v. *Harrop* (1), of a witness to a deed having put his name in the wrong place, rendering himself thereby, apparently, a party to an instrument, when he only intended to attest somebody else's signature.

The Defendant in this case, as might have been expected, has pleaded at law that the instrument was and is the thing which it appears to be. Now, if the Plaintiff were at liberty to shew that what the Defendant has so pleaded is not that which he has averred it to be, the circumstance that the Defendant is insisting upon what he knows to be an unjust defence, would not of itself let in the jurisdiction of this Court, if it did not otherwise exist. If the matter be a matter of evidence, and can be determined at law upon evidence, this Court will not entertain a bill founded on the mere allegation that an adversary is about to set up an unjust defence in an action at law. There is no equity which prevents a person setting up as many defences as he pleases.

But then I must be satisfied that this line of rejoinder would be available to the Plaintiff at law; and, as I have said, it does not appear to me that any of the authorities have gone so far. In *Wake* v. *Harrop* the majority of the Judges appear to have preferred treating such a defence as an equitable plea, rather than as a good legal defence.

I think, therefore, if the case stood there alone, I ought to overrule this demurrer.

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(1) 6 H. & N. 775. 7 Jur NS 712

But the case stands higher for the Plaintiff than I have put it. There is a jurisdiction in this Court to correct mistakes in instruments. The Plaintiff alleges that she has a right to have her agreement performed in the manner in which it was entered into, namely, that she was to have an exactly similar bill to the one she had before. Instead of that, she has a bill with her own name inserted by mistake above that of the drawer. She claims a right not to be embarrassed by this mistake. The former bills had not the name of *Druiff* upon them at all. She, therefore, wants to have the instrument rectified in that respect. She claims to have an instrument which shall be free from all doubt and embarrassment. It appears to me that if no action had been brought upon this bill of exchange, and if the bill had been filed simply for rectification of the instrument, so as to render it such an instrument as the parties agreed should be given by one to the other, the Plaintiff would have been entitled to have it rectified by striking out the name "*A. Druiff*," and putting it in the position in which it was intended to be, namely, a mere renewed bill of exchange.

In either point of view, therefore, I ought not to allow this cause to be stopped. I shall overrule the demurrer, but considering that it is very questionable whether there was any necessity for the Plaintiff to have had recourse to a double remedy, and whether she might not have made matters clear and plain by a simple bill for rectification in the first instance, I shall reserve the costs to the hearing, unless the bill be sooner dismissed, in which case they will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Thomas White & Sons,* agents for Mr. *Thomas M. Llewellin, Newport.*

Solicitors for the Defendant: Messrs. *Cookson, Wainewright, Pennington, & Wainewright.*

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Nov. 11, 22.

PORTALIS *v.* TETLEY.

Factors Act (5 & 6 *Vict. c.* 39)—*Principal and Agent—Successive Pledges by Factor.*

9CP 483-6,
488, 497,
10CP356
24ChD73.

A factor by pledging goods in his possession or under his control, as agent, for an amount which does not exhaust their value, has not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value, which shall be valid as against the principal under the Factors Acts.

Cotton was consigned for sale by *A.* to *B.* *B.* deposited the bill of lading with *C.*, a broker, and authorized him to receive and sell the cotton, and subsequently made a further pledge to *D.* of the balance of the net proceeds of the cotton by order in writing communicated to and assented to by *C.*:—

Held, that the pledge to *D.* was valid as against *A.* under the *Factors Act* (5 & 6 Vict. c. 39.)

IN December, 1864, the Plaintiffs, who were merchants at *Beyrout*, in *Syria*, shipped two cargoes of cotton by the *Rosetta* and *Lybia*, and consigned them to the firm of *Charles Joyce & Co.*, in *London*, as agents, for the sale by them of the cotton on behalf of the Plaintiffs. The bills of lading of these consignments were sent to *Joyce & Co.* by the Plaintiffs, and at the same time they drew bills of exchange upon *Joyce & Co.*, which were accepted by them, but dishonoured at maturity when they fell due (the 5th May, 1865).

In January, 1865, *Joyce & Co.* sent the bill of lading of the *Rosetta* cotton to *Cooke & Sons*, cotton brokers, at *Liverpool*, and that of the *Lybia* cotton to *Hollinshead, Tetley, & Co.*, also cotton brokers at *Liverpool*, authorizing these firms to receive and sell the respective consignments of cotton, and out of the proceeds to repay advances made by them respectively to *Joyce & Co.*

About the 15th of March, one of the partners in the firm of *Charles Joyce & Co.* called upon *Overend, Gurney, & Co.*, and requested them to accept bills of exchange for a large amount for *Charles Joyce & Co.* against the cotton of the firm which was then at *Liverpool*. *Overend, Gurney, & Co.*, declined to give their own acceptances, but suggested that they would not object to discount *Charles Joyce & Co.'s* acceptances on the security of the cotton.

Bills of exchange for £40,000, drawn by *Joyce & Co.*, of *Alexandria,* upon and accepted by *Charles Joyce & Co.*, were accordingly handed over by that firm to *Overend, Gurney, & Co.*, for discount, with an offer to hypothecate to them (*Overend, Gurney, & Co.*) the margin (estimated at £80,000) after payment of advances made by the brokers of the cotton at *Liverpool,* and a proposal to give them letters to the brokers requesting them to hold the net proceeds of the cotton on their (*Overend, Gurney, & Co.'s*) account, and also to give them a letter hypothecating the cotton to them, subject to the liens of the brokers thereon. The proposal was accepted by *Overend, Gurney, & Co.*, and accordingly, on the 17th of March, *Charles Joyce & Co.* signed and delivered to *Overend, Gurney, & Co.*, at their request, the following letter:—

"Enclosed we beg to hand you drafts of Messrs. *Joyce & Co.*, of *Alexandria,* on ourselves, for £40,000, as per particulars at foot, and which we will thank you to discount, handing us a cheque for net proceeds to-morrow. As collateral security for the due payment of the above-named acceptances, we beg to enclose the undermentioned letters to our several cotton brokers at *Liverpool,* viz.:

Armour & Co.
J. Cooke & Sons.
Whitaker, Whitehead, & Co.
Hollinshead, Tetley, & Co.
Kearsley & Cunningham.
Salisbury, Turner, & Grey.
Tetherington, Gill, & Co.
Charles Wolstenholme.

duly authorizing them to hold at your disposal the balance of net proceeds of cotton held by them for sale on our account, and we agree that the cotton shall be at once realized, and that the funds to meet our said acceptances shall be in your hands before they mature. If the said margin should be reduced by fall in price below £40,000, we agree to place in your hands further security, so as to keep you fully covered. It is well understood, and hereby agreed, that on receipt of such surplus balance remitted by these brokers, we deposit with you the cash as received. Furthermore, the above-named surplus on cotton is likewise held at your disposal, to cover your acceptances for £2,500, due 9th June next, drawn by Messrs. *Joyce & Co.* against credit, dated the 14th of January last. We enclose cheques for £400, being 1 per cent. commission for discounting our acceptances.

"It is agreed by us that we do not take any further advances from *Kearsley & Cunningham, Cooke & Sons*, and *Hollingshead, Tetley, & Co.*, against fresh consignments, until your lien has run off."

At the same time *C. Joyce & Co.* gave to *Overend, Gurney, & Co.*, letters addressed to the *Liverpool* brokers, requesting "that after paying yourselves the advances made us, you hold the balance of net proceeds at the disposal of Messrs. *Overend, Gurney, & Co.*"

Upon the receipt of the letters and the bills of exchange, *Overend, Gurney, & Co.* discounted the bills, and handed cheques for the amount to *C. Joyce & Co.* On the 1st of April, 1865, they sent to their agents at *Liverpool*, for transmission to the cotton brokers to whom they were addressed, the letters from *C. Joyce & Co.* authorizing the brokers to hold at their (*Overend, Gurney, & Co's*) disposal the balance of the net proceeds of the cotton, and on the 5th of April *Cooke & Sons*, and *Hollinshead, Tetley, & Co.*, wrote, in reply to *Overend, Gurney, & Co.*, undertaking to "hold at your disposal the balance of net proceeds of the cotton in our hands for sale on their (*C. Joyce & Co.'s*) account, after paying our own advances thereon." In respect of this discount, *Overend, Gurney, & Co.* claimed to be entitled to a lien on all cotton which, previously to March, 1865, had been delivered by *Joyce & Co.*, and was then in the hands of the *Liverpool* brokers for sale, and upon this claim turned the question in the present suit.

On the 8th of April, 1865, *C. Joyce & Co.* stopped payment, and on the 19th of May were adjudicated bankrupts. On being informed that *C. Joyce & Co.* had stopped payment, the Plaintiffs instructed Messrs. *Bustros, Cousins*, of *Liverpool*, to endeavour to obtain the cotton or its proceeds, and in pursuance of these instructions *Bustros, Cousins*, on the 20th of May, 1865, wrote to *Cooke & Sons*, and *Hollinshead, Tetley, & Co.* as follows (*mutatis mutandis*):—

"As the agents of Messrs. *Portalis & Co.*, of *Beyrout*, we give

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you notice that the $\left.\begin{matrix}21\\27\end{matrix}\right\}$ bales of cotton *ex* $\left.\begin{matrix}\textit{Lybia}\\\textit{Rosetta}\end{matrix}\right\}$ the bills of lading for which were sent to you by *C. Joyce & Co.* on the 23rd of January last, belong to *Portalis & Co.*, and that they require from you the delivery thereof. Our friends are ready, and hereby offer, to pay you all rent and other charges due in respect of the said cotton. If the cotton should have been sold this notice will apply to any proceeds remaining in your hands."

The cotton had been sold at the date of this application; and in June, 1865, pursuant to an order made in a suit of *Campbell* v. *Joyce* (instituted for the purpose of establishing the claim of *George Campbell* to a moiety of certain cotton shipped for *England* on the joint account of himself and *C. Joyce & Co.*, and, without his authority, placed by *C. Joyce & Co.* in the hands of the *Liverpool* brokers) two sums of £7747 9*s.* 8*d.* and £6880 15*s.* 5*d.* were paid to the account of *Campbell* and *Robert Birkbeck* with *Overend, Gurney, & Co.*, by the *Liverpool* brokers. The sum of £7747 9*s.* 8*d.* was alleged to have been made up in part of the proceeds of the cotton *per Rosetta,* and the £6880 15*s.* 5*d.* in part of the proceeds of the cotton *per Lybia.*

Being unable to obtain any recognition from the *Liverpool* brokers of their claim to these cottons, Messrs. *Portalis* had filed their bill praying a declaration that they were entitled to receive and recover from the *Liverpool* brokers, *Hollinshead & Co.* and *Cooke & Sons,* the proceeds of the cotton, the property of the Plaintiffs' firm, which was handed to their firms respectively by *C. Joyce & Co.* free and discharged from any claim on the part of *Overend, Gurney, & Co.*

The bill also prayed payment of the proceeds of the cotton out of the sums standing to the account of *George Campbell* and *Robert Birkbeck* with *Overend, Gurney & Co.;* or, if the Court should be of opinion that Plaintiffs were not entitled to have the proceeds of the cotton paid to them out of such last-mentioned sum, that *Hollinshead, Tetley & Co.*, and *Cooke & Sons,* might be decreed to pay to Plaintiffs the proceeds of the cotton received and sold by them respectively; and a declaration that Plaintiffs were entitled to prove against the estate of *C. Joyce & Co.*, under their bankruptcy, for the value of the said consignments at the time when the same were delivered to *Cooke & Sons* and *Hollenshead, Tetley & Co.*, after giving credit for any sums which might be paid to Plaintiffs under the decree in this suit.

Messrs. *Overend, Gurney, & Co.*, insisted, by their answer, that the cotton so pledged to them was intrusted by the Plaintiffs to *C. Joyce & Co.*, as their agents within the meaning of the Factors Acts (6 Geo. 4, c. 94; 5 & 6 Vict. c. 39), and that *Joyce & Co.* ought to be deemed and taken to have been the owners of such cotton so far as to give validity to the pledge of it to them (*Overend, Gurney & Co.*)

Mr. *Cotton*, Q.C., and Mr. *W. Pearson*, for the Plaintiffs:—

The charge attempted to be given by *C. Joyce & Co.*, in favour of *Overend, Gurney, & Co.*, can only be sustained upon the Factors Acts (6 Geo. 4, c. 94; 5 & 6 Vict. c. 39), as it would have been clearly ineffectual as a pledge before the passing of those Acts: the rule at common law having been that no right of lien can be asserted where the goods are not in the possession of the party claiming it: *Sweet* v. *Pym* (1). But it is not a valid charge within the meaning of the *Factors Act* (5 & 6 Vict. c. 39). As 1. When *Joyce & Co.* purported to make this pledge to *Overend, Gurney, & Co.*, they were not agents in possession either of the goods or of the documents of title to the goods (sect. 1), both having passed out of their possession by the previous pledge to the *Liverpool* brokers; and, 2. the transaction did not affect to give *Overend, Gurney, & Co.*, any security upon the goods and documents themselves, but merely a right to call upon the *Liverpool* brokers to hand over to them the balance of the net proceeds of the cotton after satisfaction of the claim of the brokers who held the goods and documents of title as depositees under the *Factors Act*.

[They also cited *In re Westzinthus* (2).]

[The Vice-Chancellor referred to *Navulshaw* v. *Brownrigg* (3).]

Mr. *W. M. James*, Q.C., and Mr. *W. F. Robinson*, for the *Liverpool* brokers, *Hollinshead, Tetley, & Co.*, and *Cooke & Sons*, submitted that as the cotton had been sold and the surplus proceeds paid over before notice of the Plaintiff's title was received, the bill as against these Defendants must be dismissed with costs.

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(1) 1 East, 4.

(2) 5 B. & Ad. 817.

(3) 2 D. M. & G. 441.

Mr. *Karslake*, Q.C., and Mr. *Swanston*, for *Campbell*, took no part in the argument.

Mr. *Lindley* (Mr. *G. M. Giffard*, Q.C., with him) for *Overend, Gurney & Co.*:—

Upon receiving the bills of lading, which were the "documents of title" to the goods in question, *C. Joyce & Co.* were agents, within the meaning of the *Factors Act*, "intrusted with the possession of the goods or documents of title thereto," and, as such, were owners of the property so far as to give validity to the pledge of the goods made by them to *Overend, Gurney, & Co.* (sect. 1); and the fact that the goods or documents were not, at the time of the pledge, in their actual custody, but were held by the *Liverpool* brokers, "subject to their control, or for them, or on their behalf," does not (sect. 4) divest them of the ownership, for the purpose of pledging the goods, conferred upon them by sect. 1: in other words, their possession within the meaning of the Act was not terminated or exhausted by placing the goods in the hands of the *Liverpool* brokers, as agents, for the special purpose of sale, and the pledge of the balance of the net proceeds to *Overend, Gurney, & Co.*, is protected by the Act.

Mr. *De Gex*, Q.C., and Mr. *G. W. Lawrance*, for the assignees in bankruptcy of *C. Joyce & Co.*, asked for an inquiry as to the value of the cotton.

Mr. *Cotton*, in reply.

The Vice-Chancellor made a declaration that as against the assignees of *Joyce & Co.* the Plaintiffs were entitled to prove under the bankruptcy for the value of the cotton at the time of the respective sales, but reserved his judgment upon the main question between the Plaintiffs and *Overend, Gurney, & Co.*

Nov. 22. SIR W. PAGE WOOD, V.C.:—

This is a short though rather an important point on the construction of the *Factors Act*. The question is, whether under the

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Factors Act the security to *Overend, Gurney, & Co.*, can take effect as being a pledge or security given by a factor within the powers conferred by that Act. The effect of that Act was very fully discussed by Lord *St. Leonards* in *Navulshaw* v. *Brownrigg* (1), and is shortly stated to be this, that whereas there was at first a question how far a broker could sell, unless he had authority to sell, and further, how far he could pledge, unless he had authority to pledge, in such a way as to bind his principal, the purport of this last Act (5 & 6 Vict. c. 39) was to say that the mode of raising money by pledge by a factor is to be taken as a recognised course of dealing, and that being so, the Legislature intended to give protection to all persons dealing *bonâ fide* with that person. Dealing *bonâ fide* did not imply that they were to consider the question of his being an agent or not; they might know him to be an agent or a factor, and if they knew him to be such they would assume that he had authority to pledge, and that pledge they would have, unless there were some *mala fides* in the transaction. The first clause, after reciting that litigation had arisen under the former Acts, and that much uncertainty existed, enacts: "That from and after the passing of this Act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment, made upon the security of such goods or documents, as also for any further or continuing advance" (that means to the same person) "in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

Now in this case *Joyce & Co.* had originally both the goods and the documents of title thereto. The pledge would be perfectly good as to the brokers who were to sell the goods and pay themselves out of the proceeds. But it is said that an order on the brokers directing that after selling the goods and paying their own debt the balance arising from such sale shall be paid to *Overend, Gurney, & Co.*, is not a proper pledge within the Act for two reasons: 1. that it is not a pledge of the goods in the hands of the factor, but only of the surplus moneys to arise from the sale; and 2. (which was the point mainly urged) that the factor had not at the time of his dealing with *Overend, Gurney, & Co.*, possession of either goods or documents of title, both being in the hands of the *Liverpool* brokers, who had a claim or lien upon them. That would, I think, be an exceedingly narrow construction of the Act, and I should have had no difficulty in this case except for sect. 4, which seems to raise some doubt. It seems to have been plainly intended by the Act to give the amplest power of pledging (for factors must be taken to be frequently in a position in which they will want to raise money by pledging goods) and to bind the owner of the goods by any pledge so made. If the factor pledges the goods to *A.* for half their value, and then pledges them for the remainder of their value, or for some further security, to *B.*, it would, I apprehend, be an exceedingly narrow construction to say that he is not at that time in possession of the documents and goods, both of them being in his control as against his principal until the principal withdraws them. Of course, the principal may withdraw them at any period he thinks fit before they have been dealt with, but as against the principal the only respect in which the goods are not under the control of the agent is, that he cannot withdraw them from the mortgagee without satisfying the pledge. Then comes sect. 4, which says: "Any agent intrusted as aforesaid and possessed of any such document of title whether derived immediately from the owner of such goods, or obtained by reason of such agents having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid"—there is no doubt therefore that *Joyce & Co.* were intrusted with the possession of the goods—"and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and *liens* upon the goods to which the same relates, and such agent shall be deemed to be possessed of such goods or docu-

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(1) 2 D. M. & G. 441.

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ments, whether the same shall be in his actual custody or shall be held by any other person subject to his control, or for him, or on his behalf."

The plain interpretation of that, to my mind, is, that when the factor has pledged them to a broker, or to any one else, for a debt which does not exhaust the whole value of the goods, they are in his control, being in the possession of another person subject to his control and on his behalf, to the extent to which they are not exhausted by the previous pledge. That pledge might be redeemed by him at any time, and in the eye of this Court the goods are in his possession and under his control, subject to the question of the debt being paid off. But with that his principal has nothing to do. He has not intervened, he has not revoked his authority, and at any time until that happens the factor remains, as it appears to me, the possessor of the goods which were simply pledged liable to redemption, because the person who holds them holds them subject, upon redemption, to his control and on his behalf. Then the section proceeds: "Where any loan or advance shall be *bonâ fide* made to any agent intrusted with, and in possession of, any such goods or documents of title as aforesaid" (which I now hold him to be) "on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this Act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto." Now that was the part which created a doubt at first in my mind. I think when one comes to consider it, one sees plainly what it was meant to apply to. It was not meant to apply to the case of the goods being out of the factor's possession simply by way of mortgage, and redeemable, but to the case where the factor being advised that goods are coming forward to him, agrees that as soon as he gets them, and as soon as the bills of lading come to hand, he will pledge them. The Act seems to contemplate such a

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case where the owner has not at the time actually lost his control over the goods, and the right of stoppage *in transitu* still exists. The factor may wish to pledge forthcoming goods which he has not yet actually received, and enters into a contract that whenever the goods now promised, or the bill of lading, come to hand the security shall be given. "Lend me the money now, and I will undertake that that shall be done." If you do get from the factor the goods which he is expecting before you have notice, you shall be in the same position as any other person. If you get notice before that, in that case you must submit to the consequences, as you have chosen to deal with a thing which was not in hand. *Overend, Gurney, & Co.*, dealt with a thing which was in hand because there was the bill of lading, and there were the goods, which I take to be in the factor's possession in the sense of this Act. They sent the note from the factor to the brokers directing them to hold the surplus proceeds at the disposal of *Overend, Gurney, & Co.*, and they (*Overend, Gurney, & Co.*) get an acceptance from the brokers of the factor's directions. The moment that is done they could not retract it. They have accepted the factor's orders, *Overend, Gurney, & Co.*, have made their advance upon it, and it appears to me, to all intents and purposes, that the case thereupon came within the 1st section of the Act, and is not affected by the 4th section, which at first created some difficulty in my mind, but which I hold to relate to an entirely different state of circumstances. That clause is removed out of the way by my interpretation of it, and the case falls back upon the previous clause, which seems to me to establish the lien of *Overend, Gurney, & Co.* The bill, therefore, must be dismissed with costs as against all the Defendants, except the assignees in bankruptcy of *Joyce & Co.*, without prejudice to such right of proof as Plaintiffs may establish against the bankrupt's estate.

Solicitors: Messrs. *Loftus, Vizard, & Co.*; Messrs. *Young, Jones, Roberts, & Hale*; Messrs. *Lawrance, Plews, & Boyer*; Messrs. *Field, Roscoe, & Co.*; Messrs. *Linklaters & Co.*

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2 Ch. D. 47.

MAYN *v.* MAYN.

Executory Settlement, how to be executed—Tenancy in Common.

By a deed it was, amongst other things, agreed and declared that *A.*, his executors, administrators, and assigns, should raise out of certain hereditaments £800, and should invest the same in the names of trustees at interest upon government or real securities "upon trusts to be declared for the benefit of *J. R.*, for her life, with remainder to her children, and as to the said *J. R.* to and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the £800 was ever made:—

Held, that the deed was executory only, and that the settlement so directed ought to have limited the £800, after the death of *J. R.*, amongst her children as tenants in common, and not as joint tenants.

By an indenture, dated the 2nd of June, 1835, to which *William Mayn*, *Charles Randle*, and *Jane* his wife, *James Mayn* (the elder), and others, were parties, it was, amongst other things, agreed and declared that *James Mayn* the elder, his executors, administrators, and assigns, should levy and raise out of the hereditaments, and in the manner therein mentioned, the sum of £800, and should invest the same in the names of the said *James Mayn* the elder, and *William Mayn*, and the survivor of them, at interest upon real securities in *England* or *Wales* (but nowhere else), or in the purchase of a competent share of the parliamentary stocks or funds of *Great Britain*, "to be held by him or them upon trusts to be declared for the benefit of the said *Jane Randle* for her life, with remainder to her children; and as to the said *Jane Randle*, to and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature;" and it was provided that in the meantime, and until such declaration should be made, *James Mayn* the elder, his executors, administrators, and assigns, should appropriate and retain the said sum of £800 upon the like trusts; and the indenture also provided that an acknowledgment in writing, signed by *James Mayn* the elder and *William Mayn*, or by *William Mayn* alone, that the sum of £800 had been invested in their names or in his name, should be deemed and taken to be sufficient evidence to establish that fact; and the hereditaments thereinbefore charged with the payment thereof, and the owner and owners of the said hereditaments, should thereafter be exonerated and discharged from the same principal money, and from all responsibility as to the application thereof.

No declaration was ever made with respect to the sum of £800, *James Mayn* the elder did not invest the money in the manner directed, but regularly paid the interest at £5 per cent. to *Jane Randle*, until 1838, in the course of which year £500 was raised out of the fund and paid as an advance to *J. M. Randle.* After this advance *James Mayn* the elder, during his life, continued to pay interest on the remainder of the fund. After the death of *James Mayn* the elder, the Defendant *James Mayn* continued to pay the interest to *Jane Randle*, until February, 1852, when the Defendant *Charles Randle* gave to the Plaintiff an equitable mortgage as a security for what might be due from the estate of *James Mayn* the elder in respect of the trust fund.

Jane Randle, having survived her husband *Charles Randle*, died on the 21st of March, 1864, having had three children, viz., *Charles Randle*, now living; *Jonathan Mayn Randle*, who died in 1849, never having been married, and intestate; and *Eliza Mayn Randle*, who, in July, 1849, married *Charles Claudius Rafarel*, without a settlement, and died in 1854, leaving her husband surviving. He had since died, and no administration had been taken out to her estate.

This bill was filed on the 9th of June, 1865, by *William Mayn*, against *James Mayn*, the executor of *James Mayn* the elder, who died on the 1st of December, 1849, and *Charles Randle*, stating the above facts, and praying that the rights of all parties might be ascertained and declared, and for consequential relief.

The sole question now was, whether the existing fund was to go to the Defendant *Charles Randle* alone, or to him and the representatives of his brother and sister in equal thirds. It was agreed by all parties that the advance to *J. M. Randle* should not be disturbed.

Mr. *Wickens*, for the Plaintiff.

Mr. *C. C. Barber*, for the Defendant *James Mayn*, submitted that

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the limitation to the children of *Jane Randle* must be to them as tenants in common, and referred to *Byam* v. *Byam* (1), and *De Havilland* v. *De Saumarez* (2).

Mr. *Eddis*, for the Defendant *Charles Randle*.

Mr. *Dundas Gardiner*, for the executor of Mr. *Rafarel*:—

The limitation must be to the children as tenants in common. The instrument was plainly executory, not executed: *Taggart* v. *Taggart* (3); *Stonor* v. *Curwen* (4); *Stanley* v. *Jackman* (5); *Phillips* v. *James* (6).

The directions are that the instrument shall contain "all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature"—in other words, in a marriage settlement. Amongst powers usually inserted in marriage settlements is certainly a power of advancement, which, according to Lord *Redesdale's* judgment in *Taggart* v. *Taggart*, is in itself a presumption against a joint tenancy having been intended.

Mr. *Eddis*, in reply:—

Where the words import a joint tenancy, there must be a clear intention to the contrary in order to admit a tenancy in common.

This is not a case of marriage articles, and the authorities cited have no application here. The gift is to *Jane Randle* "and her children."

The only power expressly mentioned amongst those directed to be inserted, is a power of maintenance. Nothing is said about advancement.

SIR W. PAGE WOOD, V.C.:—

It appears to me in this case, that the doctrine established with regard to marriage articles by the decision in *Taggart* v. *Taggart* must prevail.

Mr. *Chapman Barber* referred to a case, *De Havilland* v. *De Saumarez*, which I think would have governed the present, were it not that I find the decision was carefully rested upon this —that the instrument was not executory—it left nothing more to be done. Both the Lords Justices put the decision expressly upon that ground. That circumstance appears to me to take the decision entirely out of the class of cases where the instrument is executory. At least there is no indication of any intention on the part of their Lordships to hold that the decisions which have been made by the Courts upon the cases of marriage articles were improperly made, and ought to be overruled.

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(1) 19 Beav. 58.
(2) 14 W. R. 118.
(3) 1 Sch. & Lef. 84.
(4) ~~8~~ Sim. 264. 5
(5) 23 Beav. 450.
(6) 13 W. R. 934, 11 Jur N S 66

The present is the case of an executory instrument being a limitation in a deed which directs £800 to be raised, and the trusts of the same to be declared by another instrument. The limitation does not profess to be executed; but a sum of money is ordered to be segregated from a mass of property which the settlor is minded to dispose of, and he says that certain trusts are to be declared of this sum of money by another instrument. The trusts are to be for the benefit of *Jane Randle* for her life, with remainder to her children: and if the clause had stopped there the case of *De Havilland* v. *De Saumarez* (1) would have been a conclusive authority. But it goes on to say, "And as to the said *Jane Randle* to and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts, which are usually inserted in a money settlement of the like nature." Then it is provided that, "in the meantime and until such declaration shall be made," *James Mayn* the elder is to appropriate and retain the £800 upon the like trusts.

It is clear, therefore, upon these words, that he desires another instrument to be executed, with the powers and trusts which are usually inserted in a money settlement of the like nature. This seems to me to be of material consequence. He not only makes the limitation executory, but he says that it is to contain powers and trusts like those which usually are inserted in settlements of a like nature. It is plain he is referring there to the ordinary case of settlements made upon the marriage of husband and wife. It can be to nothing else than a marriage settlement that the words "a money settlement of the like nature" can refer.

That being so, I consider the case of *Taggart* v. *Taggart*

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(1) 14 W. R. 118.

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to be an express authority, where Lord *Redesdale* says (1): "Joint tenancy, as a provision for the children of a marriage, is an inconvenient mode of settlement, because during their minorities no use can be made of their portions for their advancement, as the joint tenancy cannot be severed." Now it would be very difficult to say that amongst the "other powers and trusts" (besides powers for changing securities and for maintenance) "which are usually inserted" in a marriage settlement, you would not find a power of advancement. If that be so, the case is brought within the difficulty suggested by Lord *Redesdale* of holding this to be a joint tenancy. In such a settlement, also, would be found the clause of survivorship and accruer, and all those provisions which, according to Lord *Redesdale's* judgment and decree, it would have been proper to insert.

I think, therefore, that the form of expression which has been here used is to be our guide and model in framing the instrument, and that I am bound to hold that, regard being had to the direction contained in the executory instrument, the limitation to the children must be taken to have been intended to be to them as tenants in common.

Solicitors for the Plaintiff: Messrs. *Price, Bolton, & Filder,* agents for Mr. *W. J. Genn, Falmouth.*

Solicitors for the Defendants: Messrs. *Dobinson & Geare;* Mr. *Syms.*

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(1) 1 Sch. & Lef. 88.

In re SHARP, STEWART, & CO.

V.-C. W.

1867

Nov. 23;
Dec. 19.

Company—Reduction of Capital and Shares—30 & 31 *Vict. c.* 131—*Form of Orders.*

5th 407

Three months from the date of the final order is a proper period at the end of which the addition of the words "and Reduced" to the name of a company petitioning for an order confirming resolutions for the reduction of their capital, under the *Companies Act*, 1867, may, under the 10th section of the Act, be discontinued.

Form of order and minute considered.

THIS was a Petition entitled "The humble Petition of *Sharp, Stewart, & Co., Limited*" (and by amendment) "*and Reduced,*" presented in the matter of the company, and of the *Companies Act*, 1867, praying that a reduction of the capital of the company resolved on or effected by special resolutions passed at general meetings of the company, held on the 23rd of October, 1867, and the 7th of November, 1867, might be confirmed by an order of the Court, in conformity with the provisions of the *Companies Act*, 1867, and that a proper date might be fixed by the Court at which the addition to the name of the company of the words "and Reduced" might be discontinued, and that all proper directions might be given, inquiries made, notices given, and proceedings taken for the purposes aforesaid.

The company was incorporated in 1863 as limited, the capital being £400,000, in 4000 shares of £100 each, for the purpose of carrying on the business of iron and brass founders, millwrights, engineers, tool makers, boiler makers, machinists, and iron merchants, at *Manchester*. The articles did not contain any power to reduce the capital. The number of shares issued by the company was 3500, all of which had been fully paid up.

At an extraordinary general meeting, held on the 30th of September, it was resolved that the company "may from time to time, by special resolutions, modify the conditions contained in its memorandum of association so as to reduce its capital to such an extent, and in such manner, as the company, in general meeting, shall from time to time by special resolution determine. The

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company may from time to time, by special resolution, modify the conditions of its memorandum of association, so as by subdivision of its shares from time to time existing, or any of them, to divide the capital, from time to time, of the company, or any part thereof, into shares of smaller amount than is fixed by its memorandum of association."

"On the occasion of, or as part of, or in connection with, any subdivision as authorized by the last preceding resolution, the company may from time to time, by special resolution, modify the conditions of its memorandum of association, by providing that the company shall make, or agree to make, a money payment, to be fixed by the resolution, in lieu and in consideration of the extinction of any shares which may have been issued and subdivided, or any part thereof, such money payment to be made either at once or by instalments, payable partly at once and partly at some future period or periods; the unpaid amount of any such money payment, together with interest thereon, at a rate to be fixed by the special resolution, being evidenced by coupons or certificates under the hands of one of the directors and the secretary of the company; and all members being dealt with in regard to any division of shares and money payment simultaneously *pro ratâ* upon one and the same footing, and not unequally."

At another extraordinary general meeting, held on the 23rd of October, 1867, the aforesaid resolutions were unanimously confirmed, and thereby became special resolutions; and, on the same 23rd of October, at another extraordinary general meeting held immediately after the former, the following resolution, by way of modification of the conditions contained in the memorandum of association, was carried:—"In lieu of the capital of the company being £400,000, divided into 4000 shares of £100 each (of which shares only 3500 have been issued) the capital of the company shall henceforth, until otherwise determined by the company as required by law, be reduced to £312,500. Each of the 3500 shares which have been issued shall in future, and until otherwise determined by the company, be divided into four parts, three of which shall be represented by three shares of £25 each, the remaining fourth shall be compensated for by a money payment of £25. The board shall cause certificates of these divided £25 shares to be issued to the present holders of the £100 shares, or their respective personal representatives or assigns, and shall out of such of the assets of the company as they shall think proper, pay or secure to the said present holders, or their respective personal representatives or assigns, the sum of £25 for each £100 share held by the said holders respectively, or their respective personal representative or assigns, and shall pay or secure such sum of £25 per share in the instalments and at the times and in manner hereinafter provided for, viz., one instalment of £10 per share immediately after the day on which the above resolution for the reduction of capital shall have come into operation, and the sum of £15 per £100 share (with interest from the date of the first payment at the rate of £5 per cent. per annum, payable on the 31st day of March and the 30th day of September in each year), by such instalments, and at such dates, and with such restrictions, as the board may from time to time direct, and by way of evidence of the amount for the time being remaining unpaid in respect of the said £15, there shall be attached or appropriated to each newly-divided share of £25 a coupon or certificate, purporting that to each such divided share there belongs the sum of £5, payable with interest, at the rate aforesaid, at such time or several times as the board may from time to time direct. Each of the 500 shares which have not been issued shall in future, and until otherwise determined by the company, be divided into four shares of £25 each."

At another extraordinary general meeting, held on the 7th of November, 1867, the aforesaid resolutions were unanimously confirmed, and thereby became special resolutions.

The Petition was supported by the affidavit of the secretary, who proved the above facts, and further deposed that it had been the practice of the company to require accounts of all goods and articles purchased by and delivered to them to be sent in monthly. A statement of such accounts, prepared by the secretary, and examined by a public accountant, was presented at the monthly meeting of directors, and, if found correct, the accounts were ordered to be, and were, forthwith paid. The accounts which were due up to October last, the particulars of which were set forth in a schedule, amounted to £8659 19*s.* 2*d.*, which (as stated) was about the present average monthly amount of such accounts. These

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were passed at the meeting of the 20th of November, and cheques for the several amounts had been sent to each creditor; which cheques would no doubt be paid on presentation, as the company's bankers were in ample funds. Under these circumstances there was not a single debt owing by the company the account for which had been sent in, except one which had been received that morning; but there were the ordinary current business expenses, including workmen's weekly wages, and accruing accounts for royalties, remuneration to directors, salaries, and law expenses, which had not been sent in, and therefore were not paid. The names of the parties to whom such amounts were accruing were set forth in a schedule.

The assets of the company, other than cash, bills, debts considered good, and good securities, as existing on the 30th of June, were estimated at £294,393 11*s.* 9*d.*, and at the same time the company owed debts amounting to £17,216 1*s.* 10*d.*, all of which had since been discharged; the company's loose and available funds and debts considered good then amounting to £113,168, out of which £17,500 had been paid by way of dividend. The present available funds in the nature of cash in hand and with the company's banker, bills of exchange, and good securities, amounted to £44,592, besides debts considered good, amounting to upwards of £75,546.

Mr. *Dryden* supported the Petition.

THE VICE-CHANCELLOR made an order, of which the following is a minute:—

Order, that a list of the creditors of the above-mentioned company be settled as of this date by the Chief Clerk of the Judge; and the time within which the creditors of the said company who shall not be entered on such list are to claim to be so entered, or to be excluded from the right of objecting to the proposed reduction of the capital of the said company as in the Petition mentioned, is to be fourteen days from the date of issuing the advertisement for such creditors which shall be authorized by the Judge.

The further hearing to stand over until after such list shall have been settled by the Chief Clerk.

Dec. 19. The Petition was again mentioned to-day.

The bulk of the creditors had since been paid, and the Chief

Clerk had now certified that the only unliquidated claims (which he specified) amounted to £813 5*s.* 7*d.* The proposed reduction was unopposed.

Mr. *Dryden*, for the Petitioners, asked the Court to approve a minute to be produced to the Registrar of Joint Stock Companies under the 15th section, and to direct how the registration of the order and minute was to be advertised, under the same section. He also asked the Court to fix a period at the end of which the use of the words "and Reduced" might be discontinued. The words had been used since the 23rd of November. The order should, strictly, direct an office copy of the bank receipt to be delivered to the Registrar, but it will save time if we are allowed to deliver the original.

THE VICE-CHANCELLOR said that the minute might be embodied in the order, and that would be a sufficient approval by the Court; and directed advertisements in the *London Gazette*, *Times*, and a *Manchester* newspaper. With regard to the period for the use of the words "and Reduced," His Honour said that the object of the Legislature was to make known as widely as possible the fact of the reduction of the company's capital, in order that creditors, especially foreign ones, might not be misled. The use of the words might give rise to unfavourable impressions, but inquiries on the subject would lead to explanations which would probably be satisfactory, and the use of the words, possibly, might soon become familiar. In the absence of any precedent, he should fix three months from the date of the order as the period after the expiration of which the words might be discontinued. An order was then made of which the following is a minute:—

Order, that the Petitioners, "*Sharp, Stewart, and Co. Limited and Reduced*," do, on or before the 31st day of December, 1867, pay £813 5*s.* 7*d.*, being the aggregate amount of the debts due from claims against the said company which by the Chief Clerk's certificate filed in these matters on the 17th of December, 1867, appears to have been due or unsettled on the 23rd day of November, 1867, and to be still unsettled, into the bank, with the privity of the Accountant-General of this Court, to the credit of these matters, "The Account of the unsettled Debts and Claims mentioned in the Chief Clerk's Certificate, dated the 16th of December, 1867."

And it is ordered that the said company and the said creditors respectively be

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at liberty to apply to the Judge at Chambers concerning the application of the said sum when so paid in, as they may be advised.

And it is ordered that upon such payment into the bank as aforesaid of the said sum of £813 5s. 7*d.*, the special resolution passed at an extraordinary general meeting of the said company held on the 23rd of October, 1867, and confirmed at an extraordinary general meeting of the said company held on the 7th of November, 1867, and which resolution was in the words following, namely [*reciting it*], be confirmed.

And it is ordered that this order, together with the original receipt from the Bank of *England* for such payment as aforesaid, be produced to the Registrar of Joint Stock Companies, and that an office copy of this order be delivered to him, together with a minute in the words or to the effect set forth in the schedule hereto.

And it is ordered that notice of the registration by the said Registrar of this order, and of the said minute, be published in the *London Gazette*, the *Times*, and the *Manchester Guardian.*

And it is ordered that the company, from and after the 19th of March, 1868, be at liberty to discontinue the addition to its name of the words " and Reduced."

Liberty to the Petitioners and any of the creditors to apply.

THE SCHEDULE.

MINUTE APPROVED BY THE COURT.—The capital of the company is £312,500, divided into 12,500 shares of £25 each.

Solicitors: Messrs. *N. C.* and *C. Milne.*

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Dec. 10, 11, 20

In re AGRA BANK.
Ex parte TONDEUR.

Company—Winding-up—Bank-letter of Credit—Suspension of Payment by the Bank not a Breach of Contract—Claim for Damages disallowed.

9 Eq 729, 733

Where a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading to a like amount, suspension of payment by the bank before there has been time for the letter of credit to be used, is not a breach or repudiation of contract; inasmuch as permission might have been given to the liquidators under the winding-up to negotiate the bills; and claim by the holder of the letter of credit, under the *Companies Act*, 1862, for damages for the alleged breach, disallowed.

THIS was an application on the part of Messrs. *Tondeur & Lemprière*, merchants, in partnership at *Melbourne, Australia*, having an agency at *Paris*, for the Judge to assess damages under the *Companies Act*, 1862, for the non-performance of a contract.

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In May, 1866, *Tondeur & Co.*, of *Melbourne*, requiring a credit of £10,000, applied for the same to the *Melbourne* branch of the *Agra & Masterman's Bank, Limited.*

The application was granted; and upon £100 being paid by *Tondeur & Co.* to the *Melbourne* branch, by way of commission, the following letter of credit was handed by the bank to them:—

"C.

"Issued in duplicate.

"No. 8.
"Letter of Credit.
"(against shipping documents).
"*The Agra and Masterman's Bank, Limited,*
"Incorporated by Royal Charter.
"*Melbourne*, 25th May, 1866.

"To the General Manager,
"*The Agra and Masterman's Bank,*
Limited, London.

"Sir,—At the request of Messrs. *O. Tondeur & Co.*, of *Melbourne*, I beg to establish a credit with you in favour of Messrs. *A. Seurin & Co.*, of *Mauritius*, for an amount not exceeding £10,000, say ten thousand pounds sterling, to be availed of within six months from this date, say till 25th November, 1866.

"This credit will be operated on by bills of exchange to be drawn on you at ninety days after sight, by Messrs. *A. Seurin & Co.*, on their depositing with Messrs. *Scott & Co.*, *Mauritius*, as agents for this bank, invoices (bills of lading to order and blank indorsed), for merchandize shipped to this port, for the full amount of said bills, and upon the certificates overleaf being duly signed by the said agent of this bank, shewing that such documents have been deposited accordingly.

"When exhausted, this letter of credit is to be forwarded to you with particulars of all bills negotiated under it noted on the other side, and all such bills should specify that they are drawn under '*Melbourne* credit, No. 8, of 25th May, 1866.'

"Yours faithfully,
"Entered, *J. Medlicott*, "*H. Hughes*, Manager."
"Accountant."

In the margin of this letter was written: "Insurance on the

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merchandize to be imported under this letter has been arranged for at *Melbourne.—H. Hughes,* Manager."

The certificates and particulars above referred to, were in the words and figures following:—

"The following receipt for shipping documents should be signed by the certifying agent before drafts under this credit are negotiated:—

" have this day received from invoice, bills of lading, and policy of insurance for , shipped to *Melbourne,* per
to the value of £ say .

" Particulars of bills drawn under this credit.

Date.	In whose favour.	Amount to be stated in writing.

This letter was forwarded by *Tondeur & Co.,* of *Melbourne,* to Messrs. *Seurin & Co.,* afterwards *Brunox & Co.,* their correspondents at the *Mauritius,* with instructions to purchase sugars to the amount of £10,000, or thereabouts, on account of the firm, to be shipped to *Melbourne.* Upon the agent arriving at *Mauritius* he found that the bank had stopped and the letter was useless, whereupon Messrs. *Brunox & Co.* raised the money elsewhere, at a cost, including additional discount, which they estimated at £600. The bank stopped payment on the 7th of June, 1866, and a winding-up order was afterwards made.

The *Melbourne* firm had claimed repayment of the £100; the claim was admitted to proof, and on the 8th of January, 1867, a dividend of 5*s.* in the pound was paid to them upon it.

Mr. *Druce,* Q.C., and Mr. *Warner,* for the applicants:—

The question is, whether or not the stoppage of the *Agra Bank* incapacitated them from fulfilling their contract in such a sense that they must be held to have broken the contract at the date of the suspension; it being admitted that no bills of exchange were ever presented, or bills of lading handed to the bank in *London* or *Paris*.

Where two parties contract together for a thing to be completed at a future date, if, during the interval, either party puts an end to the relation, he does that which renders him liable in damages for the breach: *Hochster* v. *De la Tour* (1); *Danube Railway Company* v. *Xenos* (2).

If a banking company give a letter of credit, and fail, that is a breach. They become unable to accept bills. If they have accepted, the holders cannot thenceforward negotiate, unless wrongfully.

The extent of the damages is here accurately measured by the difference in the discount required in order to negotiate the bills. We offer to give credit for the £25 dividend.

The stoppage of a bank is sufficient notification of its inability, without the necessity of going through the empty form of application: *Howe* v. *Bowes* (3), reversed in the Exchequer Chamber (4), but not on this point: *Byles* on Bills (5); *In re Herefordshire Banking Company* (6).

[Reference was also made to *Ford* v. *Tiley* (7).]

Mr. *Kay*, Q.C., and Mr. *Westlake*, for the official liquidators:—

The stoppage of the bank was no rescission of their contract. There can be no cause of action until a contract is complete: *Cutter* v. *Powell* (8). If the contract be to perform a thing at a future date, there can be no breach until the occasion arrives. There may be an act which amounts to a rescission, but the remedy for that is in *assumpsit*, upon a *quantum meruit*.

The argument on the other side is as though the bank had contracted to keep themselves in good credit during the time specified. That is absurd: the letter is a grant of credit, not a warranty of that credit.

In *Young* v. *Winter* (9) it was held that bankruptcy might be

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(1) 2 E. & B. 678. 17 Jur 972
(2) 11 C. B. (N.S.) 152; S.C. in error, 13 C. B. (N. S.) 825. S.C. 8 Jur NS 434-9
(3) 16 East, 112.
(4) 5 Taunt. 30.
(5) 8th Ed. p. 187.
(6) Law Rep. 4 Eq. 250, 253.
(7) 6 B. & C. 325.
(8) 2 Sm. L. C. 1, 16.
(9) 16 C. B. 401. 1 Jur NS 960.

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pleaded in bar of a covenant to repay premium. In this case the company have not even been made bankrupts. The contract was that the credit was to be covered by specific goods. *Ex parte Halliday* (1) shews that there can be no proof in bankruptcy for damages on breach of contract, unless the contract be broken before the execution of the trust deed.

The liquidators might have carried on business; but they must not cause inequality between creditors; they must not pay debts in full.

Mr. *Druce*, in reply.

[Reference was made to *Avery* v. *Bowden* (2), and to *Emmens* v. *Elderton* (3).]

Dec. 20. SIR W. PAGE WOOD, V.C.:—

It appears to me quite impossible to bring this case within the principle of the cases which have been referred to, especially the courier's case, *Hochster* v. *De la Tour* (4), which went as far as any. I consider the principle of those cases to be simply this—that if a man by his own act renders it impossible for him to perform the contract, or if he distinctly and decidedly repudiates and rejects the contract, even though the time of its performance has not arrived, and it may be said, as was said in the courier's case, that there is still time for repentance, then the contract is broken, and a remedy may be had in damages.

In this case, the contract is simply this:—£100 was paid to the *Agra & Masterman's Bank* for a letter of credit, it being known that the applicants were about to send their agent to the *Mauritius* to purchase sugar. The letter of credit is this:—[His Honour read the letter, and continued:—] The agent was empowered to shew this letter to anybody in *Mauritius*, and say, "My principals have a credit upon the bank." The terms were that bills were to be drawn against bills of lading, which bills of lading were to be acknowledged by the bank's agent, and the bills of exchange, upon being forwarded, were to be accepted. Then came the news to the agent in *Mauritius* that the bank had stopped payment.

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(1) 2 D. J. & S. 312.
(2) 5 E. & B. 714; 6 E. & B. 953. 1 Jur NS 1167; 3 Jur NS 239.
(3) 4 H. L. C. 624. 18 Jur 21
(4) 2 E. & B. 678, 17 Jur 972

Now the cases which have been cited shew that the fact of a firm becoming insolvent, or even bankrupt, is not of itself any breach of a contract of this description. *Howe* v. *Bowes* (1), indeed, shews that it is not necessary to present the bills in a case where the bank has closed its doors. But there is abundance of authority to shew that insolvency or bankruptcy does not constitute a breach of such a contract as this. In *Ex parte Halliday* (2) a man, after having entered into a contract for the delivery of goods, before the time for completion arrived assigned all his goods to trustees for creditors, and the question was, whether a person could prove in respect of a breach of contract under the trust deed. The answer was, that he could not, because it was not at all impossible that the trustees might still choose to perform the contract; and it might be beneficial to the estate that they should do so.

That really is the answer here. That the bank has stopped payment is no proof at all that they would not accept the bills. It was argued that it would be wrong in the bank to accept, and wrong in the applicants to draw the bills. But that is not so. As regards the applicants, it was known in the *Mauritius* that the bank had stopped payment. It was known what the consequences of that must be; and that if it were so the bills would have much less credit, and be worth much less. They could only be sold at a much higher rate of discount, owing to the risk that would be incurred with regard to the acceptances when they got over here.

But who could say that they would not be accepted? I remember, in an instance of a very large winding-up—I am not sure it was not in the case of this very bank—I was asked to direct the official liquidator to accept bills, in the name of the company, for the full value of goods. I was asked to do it in order to prevent the consequences of a breach of contract, and the damages that might accrue therefrom. I authorized the bills to be accepted, goods being sent over to the full amount and value of the bills. Hence it is impossible to say that the bills in this case, if they had been accompanied by the bills of lading, might not have been accepted. There would have been no impropriety in their being

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(1) 16 East, 112.

(2) 2 D. J. & S. 312.

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accepted, if it were done to save the estate from such a claim as is now made.

Then it appears that the applicants had to pay additional discount for the money which they raised. It seems to me they are not entitled to make the present claim. The letter of credit, which was very good and valuable when taken, afterwards became of less value through the failure of the credit of the bank; but still money might have been advanced upon it, though at a large discount. All it comes to is, that the applicants have not got the extent of credit they hoped to have got. They might have complained in the same way, although there had been no stoppage, if there had been disastrous rumours about the losses of the bank, and that there was great probability of a suspension of payment.

The only question is, have the bank refused to complete the contract, or disabled themselves from completing it? It does not appear that they have done either one thing or the other. Therefore I cannot allow the claim for damages.

I understand the claim for £100 has been submitted to. If it had been disputed, this claim might not have been sustained; but it has not been disputed.

I disallow the claim made upon this summons, and I give the costs of the hearing to the official liquidator.

Solicitors for the Applicants: Messrs. *Nisbet.*

Solicitors for the Official Liquidators: Messrs. *Ashurst, Morris, & Co.*

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Nov. 20, 22;
Dec. 4, 5, 11.

4 Ch 76
8 Ch 14
— 655.

COOKE *v.* FORBES.

Trade Nuisance—Pollution of Air—Injunction refused.

It is no answer to a complaint by a manufacturer of a nuisance to his trade, to say that the injury is felt only by reason of the delicate nature of the manufacture.

But the circumstances that the injury done is accidental and occasional only, that careful precautions are taken, and that there is no exceptional risk, such as arises from the storage of gunpowder or highly inflammable materials, are grounds for refusing an injunction, and leaving the Plaintiff to his remedy by action.

Where a maker of cocoa-nut matting, using chloride of tin in his bleaching liquid, complained of injury to his fabrics by reason of the chloride of tin being discoloured by sulphuretted hydrogen, thrown off by the Defendant in a manufacturing process carried on upon adjoining premises; and the evidence shewed that, owing to the Defendant's precautions, on three occasions only had an appreciable escape taken place, and then only from accidental defects which were immediately remedied—an injunction was refused without prejudice to an action at law.

THE bill was filed by *William Cooke, Samuel Hindley,* and *David Law,* of *Friday Street,* in the city of *London,* wholesale carpet dealers, and dealers in cocoa-nut fibre and cocoa-nut fibre matting, lessees for a term of twenty-one years, from the 14th of November, 1849, of a manufactory at *Old Ford, Bow, Middlesex,* adjoining the river *Lea,* and *James Figgis,* of *Cannon Street, Old Ford, Bow,* tenant of the premises, and manufacturer of matting for the other Plaintiffs, against *James Forbes* and *John Abbott,* who, in the year 1863, became and had since been occupiers of premises abutting on those of the Plaintiffs towards the north.

From the allegations in the bill it appeared that the work carried on by *Figgis* consisted of weaving cocoa-nut fibre into mats, for which purpose the matting had to be immersed in bleaching liquids, and then hung out to dry. Ever since May, 1863, fumes had issued from the works of the Defendants, who were manufacturers of sulphate of ammonia and carbonate of ammonia from the ammoniacal liquor of gas works, particularly when the wind was in the north-west, north, or north-east, the effect of which was to turn the Plaintiffs' matting, when hung up to dry after bleaching, from a bright to a dull and blackish colour, requiring the material to be again dyed, at considerable expense, the colour even then being permanently injured. These fumes were also alleged by the bill to be offensive to the smell, and injurious to the health of *Figgis* and his family, who were inmates of the manufactory, and of his servants and workmen; but this part of the case was abandoned in the reply.

Although the Defendants commenced as above stated in May, 1863, the Plaintiffs only in March, 1865, ascertained positively that the fumes from the Defendants' works were the true cause of the injury, since which time they had remonstrated in vain.

Up to the time of filing the original bill (31st of October, 1865), the Plaintiffs were unable to discover the nature of the

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Defendants' process, save that, from certain tests, it appeared to be a process which threw off sulphuretted hydrogen, ammonia, and other noxious gases in large quantities; and up to the same date all inspection by the Plaintiffs had been refused by the Defendants.

The bill alleged damage, and prayed that the Defendants might be restrained "from carrying on the said works of the Defendants in such a manner as in any way to operate to the damage of the Plaintiffs, or any of them, or of their or any of their servants, workmen, or agents, or of the said manufactures so carried on by the Plaintiff, *James Figgis*, as aforesaid," and for payment of such damages as the Court might think the Plaintiffs entitled to receive.

On the 23rd of February, 1866, the Defendants filed an answer, in which they stated that shortly after the commencement of their occupation in 1863, they erected valuable plant and machinery for carrying on the business above stated, and extraordinary precautions were taken to prevent the escape of free ammonia and sulphuretted hydrogen, with the double object of economy, and of obviating all injurious effects.

They said that after their occupation, they began erecting a new chimney shaft, whereupon *Figgis* inquired what the works were to be, and on being told the nature of the manufacture, said he would consult his solicitor, and try and stop the business. No steps, however, were taken by him as threatened; and the works were erected without opposition.

Defendants' premises adjoined the river *Lea*, and consisted of a manufactory, and a wharf called *Iceland Wharf*. To this wharf the ammoniacal liquor was brought in tightly-closed barges, from whence the liquor was pumped by steam through pipes into the manufactory, and submitted to a series of processes, which the answer minutely described, and then stated as follows:—"In the conduct of all these operations, from first to last, the utmost precautions are taken to prevent the escape of any sulphuretted hydrogen or ammonia, and such escape is effectually prevented, and so completely so, that the test papers remain unaffected though held in the steam arising from the open vessels where the sulphate of ammonia is evaporated."

It was stated further, and not disputed, that from the manufacture of carbonate of ammonia "no sulphuretted hydrogen, or any other noxious fume," issued.

The Defendants accounted for the discolouration of the Plaintiffs' goods by saying that they believed the bleaching liquid consisted of a weak solution of oil of vitriol, and that the effect of the bleaching was for a time to put a face on the matting so as to discharge, to some extent, the dark colour of the fibre, but the use of the acid was liable to cause discolouration by reason of its counteraction when it became concentrated in the act of dyeing, and the bright colour at first imparted was not permanent. They further stated that, since 1865, from causes which they specified, "the best cocoa-nut matting has been, and is still, made without bleaching or dyeing."

Finally, they denied that the discolouration complained of was caused by fumes from their works, or that any injurious fumes issued either from their works or from the river adjoining.

Issue having been joined on the 26th of June, 1866, on the proposal of the Defendants, the Plaintiffs not objecting, the evidence was ordered to be taken *vivâ voce.*

The Plaintiffs established the fact that they used no sulphuric acid, and that the basis of their bleaching liquid was chloride of tin, which they said was darkened by the sulphuretted hydrogen.

On the other points the evidence will be found fully discussed in the judgment.

Mr. *Grove*, Q.C., Mr. *Little*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs:—

The questions of fact are two; does sulphuretted hydrogen issue from the Defendants' works? and does it cause injury? We make no complaint as to the ammoniacal gas, which is not injurious to our manufacture. The Defendants admit the immense difficulty of preventing the escape of sulphuretted hydrogen. In *Tipping* v. *St. Helen's Smelting Company* (1), it was admitted that there was a nuisance, and alleged that every effort had been made to abate it; but that was not held to be any defence to a prayer for an injunction. If damages would be awarded at common law (and here

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(1) Law Rep. 1 Ch. 66, 68.

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they would) an injunction follows as matter of right: *Walter* v. *Selfe* (1).

On the question of laches: we could not have restrained the erection of the chimney; we were compelled to wait till we could prove the injury: *Haines* v. *Taylor* (2); *Attorney-General* v. *Mayor of Kingston* (3).

Under the old practice we should have been put to our action for damages; now the Court can award them under *Lord Cairns' Act*.

Mr. *G. M. Giffard*, Q.C., Mr. *Kay*, Q.C., and Mr. *Martineau*, for the Defendants:—

This bill was not filed till October, 1865, and then had to be accelerated by a motion to dismiss for want of prosecution. There has been no attempt to get an interlocutory injunction: *Bacon* v. *Jones* (4).

There is a distinction in law between personal injury and injury to trade property: *St. Helen's Smelting Company* v. *Tipping* (5). Now this is a neighbourhood notorious for the number of its noxious manufactures; but upon the evidence of Dr. *Odling*, the Plaintiffs' own witness, no legal injury to an ordinary occupant for an ordinary purpose, has been inflicted. The Plaintiffs say that their chloride of tin is converted by our sulphuretted hydrogen. Our evidence is, that if the Plaintiffs were not to use, as they do, a particular bleaching liquid, their fibre would not be affected; that their process is unusual, not according to the custom of the trade, and even damaging to their own fabrics. If they carry on their business in an extraordinary way, the Court will not interfere. The case of *St. Helen's Smelting Company* v. *Tipping* (6), shews that Plaintiffs in suits for injunction for nuisance must not stand upon their extreme rights. The question of injury or no injury to trade is a question of fact, depending on all the circumstances.

The Court is dealing now with a question of air, not of light, and the *Prescription Act* (2 & 3 Will. 4, c. 71, s. 2), does not apply. The Act applies to easements, like rights of way, but not to air: *Webb* v. *Bird* (7). And in any event there can be no prescriptive

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(1) 4 De G. & Sm. 315.
(2) 2 Ph. 209.
(3) 13 W. R. 888. 11 Jur NS 596
(4) 4 My. & Cr. 433, 438.
(5) 11 H. L. C. 642. 11 Jur NS 785
(6) Ibid. pp. 644 and 653. 11 Jur NS 78
(7) 13 C. B. (N.S.) 841. 8 Jur NS 621

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right to have any greater amount of fresh air than an ordinary occupant would be entitled to.

Mr. *Grove*, in reply.

Dec. 11. Sir W. Page Wood, V.C., after stating the nature and frame of the suit, continued:—

The question of health was, I think very properly, abandoned in reply, inasmuch as the circumstances are strong to shew that no such injury has been inflicted.

The case, then, is reduced to the question of the injury which is alleged to have been done to the Plaintiffs' manufacture:—[His Honour read the principal allegations in the bill.]

It is important to see what the issues raised in the pleadings are, because the Defendants do not say (indeed, they could not have said, although it was so argued for them by their counsel at the bar): "We are entitled to pour noxious fumes into your property, and you are not entitled to complain if you should suffer any injury in your manufacture; more especially regard being had to your choosing to establish in this neighbourhood a manufacture which requires such delicate handling as that a particular gas will affect it and impair its value." What they say by their answer, impliedly, if not distinctly, is—that their manufacture does require the greatest possible precautions to avoid the emission of sulphuretted hydrogen, which everybody knows to be a very offensive gas; that they have taken those precautions successfully, and that, in fact, no damage has been done. I may here say, I think it proved beyond dispute in this case, that sulphuretted hydrogen does produce an injurious effect to a certain degree on the manufacture of cocoa-nut matting, owing to the use in the bleaching liquid of chloride of tin, which when affected by sulphuretted hydrogen is turned to a darker colour.

In that state of things, I apprehend the issue is reduced to one of mere fact, not simply whether or not any damage has been done, but with reference, also, to the extent of the damage, and as to the necessity of granting an injunction, upon which point I took time to consider the whole case.

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As regards the state of the law upon the question, whether or not a person is entitled, because there are noxious vapours existing already in the neighbourhood, to add to that accumulation by creating additional noxious vapours, and pouring them in upon his neighbour's property, it is sufficient to say that it is well settled by the case of *St. Helen's Smelting Company* v. *Tipping* (1), where the summing up of *Mellor*, J., was approved by the House of Lords, and must be taken to have laid down the correct law on the subject.

Consequently, it appears to me quite plain that a person has a right to carry on upon his own property a manufacturing process in which he uses chloride of tin, or any sort of metallic dye, and that his neighbour is not at liberty to pour in gas which will interfere with his manufacture. If it can be traced to the neighbour, then, I apprehend, clearly he will have a right to come here and ask for relief.

But the real point I have to consider and determine is, whether a person carrying on a manufacture in itself lawful—a manufacture required to be carried on with great precaution in order that the neighbour may not be injured, but still using these precautions, and yet occasionally, by accident, injuring that neighbour—whether that is a case for an injunction, or whether it is not a case in which, when the neighbour is injured, his remedy must be by action. In other words, whether a man is to be placed under the necessity of carrying on his manufacture subject to perpetual applications for commitment for contempt, because his manufacture is of such a character as that, whenever an accident does occur, some damage may be inflicted upon his neighbour.

I take it in such a case as I have mentioned, although I have not found any authority expressly pointing to it, there is a limit which must be drawn. If a person has a quantity of material necessary for the manufacture of gunpowder, of so dangerous a character that if the slightest accident occur the damage done to his neighbours is irreparable—gunpowder being an article that if kept in quantities near any public highway, or near any property where individuals are living, is itself a nuisance, and held to be so in law—in that state of things the Court will interfere at once by injunction. I acted upon the same principle in the jute case,

(1) 11 H. L. C. 642. 11 Jur NS 785,

Hepburn v. *Lordan* (1). I thought it was within the doctrine of the gunpowder case, that a person could not be allowed to expose jute to dry where the consequences of a slight accident would be fatal to everybody around. Here I have nothing of that description. This is an instance of a person carrying on a manufacture which, if his neighbour had not happened to have another manufacture of great delicacy, probably would not have caused any injury to the neighbour. Still, he has not a right to injure his neighbour's manufacture at all; and if it had been proved to me that the injury was of such a character as I have described, a grave injury occurring every time that an accidental escape took place—or if it had been proved to me that there had been a constant repetition of the injury, then, I apprehend, the proper course would have been to grant an injunction.

But if, on the other hand, it should be proved—and that is the conclusion I have come to upon a careful consideration of the evidence—that the injury, though it may have occasionally happened, is, to the whole extent of it, not traceable to these works, then, notwithstanding the authority of the *St. Helen's Case*, the Plaintiff will not be entitled to an injunction. Or, if there be no right asserted by the Defendant to injure his neighbour; if, on the contrary, the assertion by him is that he does not do it, or that, if he does, it is simply from accidental circumstances, which from time to time happen, and for which the Plaintiff may have a remedy in damages; and if it appears that that is what the case amounts to upon the evidence, it does not seem to me that the proper remedy is by injunction in this Court.

I have referred to the case of *Attorney-General* v. *Sheffield Gas Consumers Company* (2), in which Lord Justice *Knight Bruce* differed from Lord Justice *Turner* and the Lord Chancellor:—[His Honour reviewed that case at length, and observed that there the injunction was refused because the injury, which consisted of hindrance to traffic from the taking up of parts of streets by a private gas company, was neither serious nor continuous. His Honour then continued:—]

Now, I have to inquire what is the extent of the injury here? Upon the whole evidence I do not find anything to satisfy me that

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(1) 2 H. & M. 345. 11 Jur NS 132, 254.

(2) 3 D. M. & G. 304. 17 Jur 677

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there were more than three occasions, at most, during the period of four years and a half since the Defendants' manufacture commenced, when injury of any description was done. The question then being as I have before described it, I confess the case appears to me to be one much more governed by the doctrine which was referred to in *Attorney-General* v. *Sheffield Gas Consumers Company* (1) than any of those cases where the injury is either very vast, or of very sudden or frequent occurrence, or where the right is set up to inflict the injury. It is not because counsel argued that the Defendants would have a right to do this—that being one of the points of law which they thought it right to submit to the Court—that therefore I am to assume that the Defendants make it. As I have said, I do not find that the Defendants have ever asserted a right to pour out anything deleterious upon their neighbours.

As to the extent of the damage, I am left extremely in the dark; but, as far as the evidence goes, if I had to decide upon it as a jury I should not feel competent to assess anything more than nominal damages. The only satisfaction I have in disposing of the case on these grounds is, that a jury would not have assisted me, because with a jury I could only have tried the particular cases on the particular days specified, of which days I have already given the Plaintiff the benefit. I think that he has shewn evidence which might have satisfied a jury that upon two days mischief was done. I think as to the third there may be a doubt. He may have the benefit of the doubt, but a jury could not tell me that there was a single other day upon which it happened, because there is no evidence to go to a jury as to damage on any other day.

The result, therefore, of the whole case is, that I must dismiss the bill. I do not think it a case for an injunction, and considering that the bill was filed so late as it was, and considering all the opportunities given to the Plaintiff to make out his case, of which he did not avail himself, I am bound to dismiss it with costs, without prejudice to any action he may be advised to bring if he thinks he can get damages.

Solicitors for the Plaintiff: Messrs. *Reed, Phelps, & Sidgwick.*
Solicitors for the Defendant: Messrs. *Walker & Martineau.*

(1) 3 D. M. & G. 304. 17 Jun 677

BAILLIE *v.* BAILLIE.

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Dec. 3.

Testator domiciled in England—Proceedings in Scotland against his Executors—Injunction.

A testator domiciled in *England* gave his real and personal property, situate in *England* and *Scotland*, to be divided between two of his sons, and appointed his three sons executors. The will was proved in *England* by two of the sons. At the death of the testator the other son, one of the residuary legatees, was indebted to an insurance company carrying on business in *Scotland* and *England*, who obtained judgment in an action in *Scotland* against such son, and proceeded in *Scotland* against the executors to arrest the amount in their hands, to which the indebted son was entitled. The Court, upon the executors undertaking to obtain forthwith an administration decree in *England*, granted an injunction to restrain the proceedings in *Scotland* against the executors.

HUGH DUNCAN BAILLIE, of *Rutland Gate*, in the county of *Middlesex*, the father of the Plaintiff, *Duncan J. Baillie*, and of the Defendants, *Henry J. Baillie* and *Hugh S. Baillie*, by his will, dated in April, 1866, devised and bequeathed the residue of his real and personal estate, after payment of various legacies, unto and to the use of his two sons, the Defendant, *Hugh S. Baillie*, and the Plaintiff, their heirs, executors, and administrators, to be divided between them as tenants in common, and the testator appointed his three sons his executors.

The testator died in June, 1866, domiciled in *England*, and his will was proved in *England* by *Henry J. Baillie*, and the Plaintiff.

The testator left considerable personal property, locally situate, for the most part, in *England*, but as to certain portions thereof locally situate in *Scotland*, and after payment of his debts and legacies there would be a considerable residue of personal estate coming to the Plaintiff and *Hugh S. Baillie*.

The Plaintiff had at various times since the death of the testator made advances to his brother, *Hugh S. Baillie*, amounting in the whole to the sum of £3735, and *Hugh S. Baillie* signed certain memoranda agreeing to execute a mortgage to his brother of the interest to which he was entitled under his father's will, by way of security for such advances.

The Defendants, the *North British and Mercantile Insurance Company,* which was a company carrying on business in *London* and in *Edinburgh,* had obtained judgment in the Court of Common Pleas in *England* and in the Court of Session in *Scotland,* against the Defendant, *Hugh S. Baillie,* for the sum of £8123, claimed by the insurance company to be due in respect of certain loans made in *England* to the Defendant, *Hugh S. Baillie,* by the *United Kingdom Assurance Company,* an English company, which afterwards became merged in the *North British and Mercantile Insurance Company.* The latter company had also instituted proceedings in the Court of Session in *Scotland* against *Henry J. Baillie* and the Plaintiff, with a view to arrest or attach there the balance which should, upon taking the accounts of the testator's estate, appear to be coming to *Hugh S. Baillie* in respect of his moiety of the testator's residuary estate, and to compel *Henry J. Baillie* and the Plaintiff to account in the Court of Session for their receipts and payments as executors of their deceased father; and the *North British and Mercantile Company* alleged that they were entitled to the said moiety of residuary estate in priority to the sums secured to the Plaintiff.

The Plaintiff alleged that the questions arising in reference to the administration of the testator's estate could be conveniently adjudicated upon and decided only by an English Court, and the bill prayed that the usual accounts might be taken of the estate of the testator, and that the same might be administered by this Court; that an account might be taken of what was due to the Plaintiff on the securities given to him by *Hugh S. Baillie,* and that he might be at liberty to retain the amount thereof, and that the residue might be secured for the benefit of *Hugh S. Baillie,* and that the *North British and Mercantile Insurance Company* might be restrained from further prosecuting their proceedings in the Court of Session in *Scotland,* or else that they might be restrained from prosecuting the same further than might be necessary for the purpose of establishing their right to the amount which should be found due to *Hugh S. Baillie* in respect of his moiety of the residuary estate of the testator, after retainer thereout of the amount due to the Plaintiff.

The *North British and Mercantile Insurance Company* by their answer stated that the testator was entitled at his death to considerable assets locally situate in *Scotland*, the Defendant *Hugh S, Baillie's* share whereof was more than sufficient to satisfy their judgment debt, that the probate of the testator's will was recorded in the Consistory Court books of *Edinburgh*, that the testator had had a residence in *Scotland*, and that both the Plaintiff and *Henry J. Baillie* occupied residences in *Scotland*.

It was not disputed that the testator and his sons were all domiciled Englishmen.

Mr. *Cole*, Q.C., and Mr. *Haynes*, for the Plaintiff:—

The testator was a domiciled *Englishman*, and the chief part of his personal property was in *England*, and it is in *England* therefore that his estate must be administered. Until the accounts are taken the executors cannot admit assets. The Defendants have no right to take proceedings against the executors in *Scotland* in respect of property situate in this country, and as respects the small portion of personal property situate in *Scotland*, the company can have no claim against the executors until that property is administered in this Court. The company is more an English company than a Scotch company. It was English at the time the debt was contracted, but has since been merged in a Scotch company. They have commenced an action in *England*, and that will be sufficient to decide the question between the parties. It is unjust to allow the Plaintiffs to be harassed by two suits, when the matter can be more conveniently tried in one suit in this country.

In the case of *Preston* v. *Viscount Melville* (1), the testator was a domiciled *Scotchman*, but the next of kin had obtained administration of the personal estate in *England*. The trustees of the will raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, but the House of Lords held that the personal estate in *England* must be administered here by the administratrix, since all personal estate must be administered in the country in which possession is taken of it.

Then in *Bunbury* v. *Bunbury* (2), an injunction was granted to

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(1) 8 Cl. & F. 1.

(2) 1 Beav. 318.

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restrain proceedings instituted in *Demerara* to recover real estate there, on the ground that there were other questions between the parties connected with the estate which could be more conveniently determined together in this country; and in *Bushby* v. *Munday* (1) the Defendant raised an action in *Scotland* against the Plaintiff, in order to enforce payment of a bond out of an estate in that country, but a suit having been instituted in *England* by the Plaintiff for the purpose of having the bond delivered up to be cancelled, the Court restrained the suit in *Scotland* because the question could be more conveniently tried here, and the ends of justice required that the Scotch proceedings should not be allowed to go on.

Beckford v. *Kemble* (2) was another case in which an injunction was granted to restrain proceedings in a Colonial Court by a mortgagee to foreclose; that suit having been instituted after the English suit, which directed inquiry as to what was due on the mortgage.

Upon all these authorities it is submitted that we are entitled to our injunction to restrain the proceedings by the company in *Scotland.*

Mr. *Wickens,* and Mr. *Davey,* for the *North British Insurance Company:*—

It may be true that the testator, *Duncan Hugh Baillie,* was a legally domiciled *Englishman,* but he had a considerable amount of personal estate in *Scotland.* He also had a residence in *Scotland,* and was there a great part of his time. The executors of the will have proved in *England,* but they have also recorded the will in the Consistory Court of *Edinburgh.* The share of *Hugh S. Baillie* in the personal estate in *Scotland* is sufficient to answer the claim of the insurance company, and the company goes against the executors in respect of their debt, which they have a perfect right to do. The company are justified in establishing their claim in *Scotland* against the property which is in *Scotland.*

The executors are debtors to *Hugh S. Baillie* to the amount of his share in the estate, and the company having got a judgment against the executor may proceed to obtain payment of the money.

(1) 5 Madd. 297.

(2) 1 S. & S. 7.

There is no precedent for restraining a suit in another country which was instituted before a decree in this Court. The cases cited were all cases in which there had been a suit instituted in this country, and a decree obtained before proceedings were commenced abroad. This was the case in the *Carron Iron Company* v. *Maclaren* (1), where an administration suit was instituted in *England*, and decree obtained for taking the accounts before the proceedings were taken in *Scotland*. So in *Harrison* v. *Gurney* (2), the trustees in that case were restrained from proceeding in the Court of Chancery in *Ireland* after a decree for the execution of the trusts in this country. In *Hope* v. *Carnegie* (3) a decree had been made in *England* for the administration of a certain estate, and proceedings were afterwards instituted in the *Netherlands* for the administration of both the real and personal estate in that country. Vice-Chancellor *Stuart* made an order restraining the prosecution of the pending proceedings in the *Netherlands*, and the taking any proceedings there as to the personal estate. On appeal, Lord Justice *Knight-Bruce* thought that the order ought to have allowed proceedings to be continued as to the real estate, but the order was not varied, in consequence of Lord Justice *Turner* being of the same opinion with the Court below. These cases shew that at any rate the Court will not restrain proceedings in a foreign Court till after a decree made in this country.

SIR R. MALINS, V.C.:—

It is admitted that the testator, *Duncan Hugh Baillie*, and his three sons, were all domiciled *Englishmen*. The *North British and Mercantile Insurance Company* carry on their business both in *London* and in *Edinburgh*, and have offices in both places, and with the idea that they might gain some advantage in a Scotch Court rather than an English Court, they took proceedings in *Scotland* against these gentlemen. Now, what is their claim? They are not creditors of *Hugh Duncan Baillie*, the father, but creditors of *Hugh S. Baillie*, one of the sons, a residuary legatee of the testator, and they claim against the two executors, *Duncan J. Baillie* and *Henry J. Baillie*, to attach all moneys in

(1) 5 H. L. C. 416.
(2) 2 Jac. & W. 563.
(3) Law Rep. 1 Ch. 320. 12 Jur NS 264

their hands belonging to *Hugh S. Baillie.* Now it appears, at present, that there is no *constat* that there is a single penny in their hands belonging to *Hugh S. Baillie.* In the proceedings in *Scotland* the Defendants have solemnly denied that they have any sum of money in hand. The only way the company can possibly ascertain whether they have a sum of money in their hands or not is by availing themselves of that remedy to which they are entitled, namely, to take an account of the testator's estate. But this was the estate of a domiciled *Englishman,* and the question is about personal estate. I do not interfere with any remedy they may have in *Scotland* against any real estate belonging to *Hugh S. Baillie* which is in *Scotland.* But this is a claim with regard to the personal estate of the father, a domiciled *Englishman,* and nothing is more clear than that personal estate has no local habitation. It follows the domicile, and where the domicile of the person is, there the estate must be administered. This is an estate which must be administered in this country, and this is the proper Court in which that estate should be administered. If he has property in *Scotland* the English executors who proved the will in the English Court of Probate, have proved the will in *Scotland,* in order to clothe themselves with the character of legal personal representatives, so as to enable them to sue for the recovery of a debt owing to the testator, or to dispose of personal property which may happen to be in *Scotland,* as, for instance, a leasehold estate. Having clothed themselves with that authority it is said that it justifies these parties suing them in *Edinburgh* and there putting them to account. Now, it is perfectly clear that they are liable to an action in this country; they have proved the will in this country, and this bill is filed for the administration of the estate. It has been said that this is not an administration bill, but a bill filed by a creditor to assert priority against another creditor. It is a bill perfectly right in its frame. It is a bill by one of the residuary legatees and executors against the other executor and the other residuary legatee. The first prayer of the bill is, that an account may be taken of the real and personal estate of the testator, *Hugh Duncan Baillie,* under the direction of the Court; and it prays that an account may be taken of what is due to the Plaintiff from the

Defendant, *Hugh S. Baillie*, in respect of his advances, and that these may be repaid to him. What is the object of this suit? the Plaintiff says, "I am entitled to a share of the testator's estate; my brother, to whom I made advances, is entitled to another share; let an account be taken." And when it is ascertained to what he is entitled, he prays that out of his brother's share he may be repaid the sums advanced by him upon the faith of that share. This Scotch insurance company do not pretend that they have any claim directly on the testator's estate, but that they have advanced money to *Hugh S. Baillie*, and they say, "Whatever he is entitled to we are entitled to, and we are entitled to take even in priority to *Duncan J. Baillie*, until we are paid in full." Now, to ascertain whether there is anything for either of these creditors, as the executors do not admit assets, it is absolutely necessary that an account should be taken. Therefore, what is the proper course to be taken, whether by the Scotch insurance company, or the Plaintiff, *Duncan J. Baillie?* First of all, an account must be taken, and undoubtedly not in a Scotch Court. I should be acting in opposition to every principle if I were to allow the estate of a domiciled *Englishman* to be administered and an account to be taken in a foreign country, when there is an existing suit here. Here alone the account must be taken. It is said that there is no decree in this case, and it is contended that all the cases proceed upon the ground of a decree having been made. Many cases have been cited, in some of which there was a decree, and in some there was not; but the Court has not refrained from acting upon the principle, in the case where there has not been a decree, any more than where there has been one. The most recent case upon the subject is that of *Hope* v. *Carnegie* (1). There it is stated there was a decree. I was counsel in that case, and I am perfectly satisfied from all I know of the case that if there had been no decree and a pending suit, the same principle would have been acted upon. Lord Justice *Knight-Bruce* said he thought the injunction ought not to extend to real estate. By the report in the Appeal Cases, it is stated that the Plaintiff moved for an injunction, and it was held that no proceedings could be allowed as to the personal estate, not because there had been a decree, but upon the general principle that with respect to the administration of the estate of a domiciled *Englishman* no proceedings will be allowed in a foreign Court, and therefore the mere fact of a bill pending is sufficient; it is not necessary that there should be a decree. The Court will interfere to prevent proceedings in a foreign Court, which will involve the necessity of taking the account of the testator's estate before a foreign tribunal. Here, I am satisfied from all I have heard that no conclusion can be arrived at favourable to the company without taking an account of the testator's estate, and ascertaining whether the executors have anything in hand applicable to the payment of this debt. I cannot permit any proceedings to go on in *Scotland* which will involve the necessity of taking an account. I must, therefore, grant the injunction to stay them. With regard to the want of a decree, it is a material circumstance that Mr. *Cole*, on behalf of the Plaintiff, offers now to take an ordinary decree for the administration of the real and personal estate of the testator. It was said that the objection at one time raised to that was, that the Defendants, *Henry J. Baillie* and *Hugh S. Baillie*, were not before the Court; and it was stated that they did not appear because they have no direct interest in the question as to priority between the Plaintiff and the Scotch company. It is now stated at the bar that they have consented. The company, however, refuse to consent to a decree being taken for the administration of the estate, and it cannot be made unless all parties consent. I cannot now make a decree adversely, but the material circumstance is, that all parties except the Scotch company do consent; therefore I shall treat it in the same way as if a decree were made, because the only opposition to my making the decree is from the Scotch insurance company, who prefer going before a Scotch tribunal. I shall put you, Mr. *Cole*, upon an undertaking that you will forthwith file a bill in which the Scotch insurance company will not be necessary parties, and that you will forthwith obtain a decree for the administration of the estate.

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(1) Law Rep. 1 Ch. 320. 12 Jur NS 284.

Mr. *Cole* consented to this course.

The VICE-CHANCELLOR:—I think there ought to be no delay in taking the account. When that is taken, if it is ascertained that there is no residue, there will be nothing to satisfy the demands of the company. If there is a residue sufficient to satisfy the demands of *Duncan J. Baillie* and the Scotch insurance company, there will be nothing to contest. If there is some residue, but not enough to satisfy both, then this is the proper tribunal in which the priority of the different incumbrancers should be decided. I can see no excuse for the company refusing to submit to a decree for the administration of the estate. And I grant the injunction to stay all further proceedings.

Solicitors for the Plaintiffs: Messrs. *Leman, Groves, & Leman.*
Sloicitors for the Defendants: Messrs. *Bircham & Co.*

ST. AUBYN *v.* SMART.

V.-C. M.
1867
Dec. 14, 15.

Partnership—Liability of one Partner for Money received by Co-partner—Business of Solicitors—Misrepresentation—Money-Bill—Jurisdiction.

The Plaintiff being entitled to a share in a fund in Court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money from the Accountant-General. The Plaintiff was in the habit of addressing his letters to *B.*, one of the partners, individually, and not to the firm, and he sent the power of attorney addressed to *B.*, who, under it, received the money, and signed the receipt in his own name. *B.* paid the money into his own private banking account, and shortly afterwards absconded with it. Upon bill, seeking to make *S.*, the other partner, liable to repay the money to the Plaintiff, but not praying for an account:—

Held, that although the Plaintiff corresponded with *B.* alone, he, in fact, employed the firm; that the money, as soon as it came into the hands of *B.*, must be treated as in the hands of the firm; that it was received by them in the ordinary discharge of their duty as solicitors; that there was jurisdiction in equity although there might be concurrent jurisdiction at law; and decree against the Defendant, *S.*, for repayment of the amount to the Plaintiff, with interest.

8 Eq 298, 30
11 Eq 219.
18 Eq 626-632
24 Ch D 15
25 Ch D 15

affd 3 Ch 646 L.JJ.

THE question in this case was, whether one partner in a firm of solicitors was liable to repay to the Plaintiff a sum of money received by his co-partner, who had misappropriated it.

The Plaintiff, Mr. *Lionel St. Aubyn*, an officer of the army, was entitled, in the year 1858, to a share of a fund in the Court of Chancery, and in that year a Petition was presented to the Court upon which an order was made for payment of his share out of Court. On this Petition the Plaintiff was represented by the firm of *Smart & Buller*, to whom, it appeared, he had been introduced by a member of his family, having known neither of the partners before. The money under the order having become payable, and the Plaintiff being stationed with his regiment at *Malta*, *Buller* wrote to him, enclosing a power of attorney to his firm to receive the money. This power of attorney, which was joint and several in favour of Messrs. *Smart & Buller*, was duly executed, and returned by the Plaintiff to *Buller*, directing him to pay part of the money to his army agents, and retain the balance till the Plaintiff returned to *England*. It appeared that *Buller*, in writing to the Plaintiff, had signed the letter with his own name instead of the name of the firm. Under this power of attorney *Buller* alone received the money, amounting to £582 3*s.* 6*d.*, from the Accountant-General, signed the receipt in his own name, and paid the money into his own private banking account, from which he shortly after drew it out, and absconded to avoid his creditors.

The bill of costs in relation to the Petition and receipt of money, including an item for drawing request for power of attorney for receipt of principal money payable to the Plaintiff, was made out in the name of the firm, and the taxed amount received by the Defendant *Smart*.

It was admitted that the Defendant had not actually received the money; but the Plaintiff, by his bill, charged that it was received by *Buller* in the ordinary course of business; and prayed that the Defendant *Smart* might be declared answerable for the amount so received, and might be ordered to pay the same to the Plaintiff with interest at 5 per cent.; but no account was asked for.

Mr. *Glasse*, Q.C., and Mr. *G. O. Edwards*, for the Plaintiff:—

This is clearly a case in which the Court will hold one partner liable for money received by the other partner, and misapplied by him. The Plaintiff employed the firm, and the money was received in the ordinary course of business, and immediately the cheque came into the hands of one partner, it must be treated as having come into the hands of the firm: *Atkinson* v. *Mackreth* (1).

Mr. *Cotton*, Q.C., and Mr. *Smart*, for the Defendant:—

The Plaintiff's remedy (if any) against the Defendant is at law. The only ground for coming into equity is fraud or misrepresentation by one partner as to how the money was applied: *Blair* v. *Bromley* (2). In this case the receiving the cheque was no fraud, but only the subsequent application of it; and that is not sufficient to give the Court jurisdiction. In the case of *Atkinson* v. *Mackreth*, the point was never raised; moreover, in that case the bill prayed an account. Here no account is asked, but only that the Defendant may be declared liable for a certain fixed sum, and it is a proper case for law: *Foley* v. *Hill* (3); *Makepeace* v. *Rogers* (4); *Phillips* v. *Phillips* (5).

The question is, whether the receipt of *Buller* is constructively the receipt of the firm. It is no part of the ordinary business of solicitors to receive money for their clients in the absence of any power of attorney. The manner of dealing must be looked at: the Plaintiff addressed his letters to *Buller* individually, instead of to the firm; he put it in the power of *Buller* to receive the money alone under the power of attorney; and, having done so, he cannot now come upon the Defendant for the money which he himself enabled *Buller* to receive without the knowledge of the Defendant; and having trusted one partner alone he cannot make any claim as against the firm so as to render the other partner liable: *Coomer* v. *Bromley* (6); *Ex parte Eyre* (7); *Viney* v. *Chaplin* (8); *Bourdillon* v. *Roche* (9); *In re Fryer* (10).

The fact that the Plaintiff slept on his claim from 1859 to 1863 shews that he looked on *Buller* as alone liable for the money.

Mr. *G. O. Edwards*, in reply, referred to *In re Lawrence, Ex parte Burdon* (11), but was stopped by the Court.

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(1) Law Rep. 2 Eq. 570.
(2) 5 Hare, 542, 556.
(3) 2 H. L. C. 28.
(4) 34 L. J. (Ch.) 396. 11 Jur. N.S. 215 314
(5) 9 Hare, 471.
(6) 5 De G. & Sm. 532.
(7) 1 Ph. 227.
(8) 2 De G. & J. 468. 4 Jur. N.S. 619.
(9) 27 L. J. (Ch.) 681. 3 Jur. N.S. 485
(10) 3 K. & J. 317.
(11) 2 Sm. & Giff. 367.

(11) S.C. 4 De G. J. & S. 649

Sir R. Malins, V.C.:—

The first question arising on this case is, whether the money was received by the firm of *Smart & Buller*, because if it was received by *Buller* individually, then, of course, *Smart* is not liable.

In support of the proposition that the money was not received by the firm, it is said that the money never went into the hands of the firm. But what doubt can there exist but that the money did come into the possession of the firm? The Plaintiff employed the firm of *Smart & Buller*. All the entries in relation to his business are in the books of the firm; and the bill of costs was delivered in the name of the firm, and *Smart* received the amount of the bill in relation to those transactions. It is, therefore, perfectly clear that the firm of *Smart & Buller* were employed by the Plaintiff.

It is, however, contended that, inasmuch as the Plaintiff corresponded with *Buller* alone, he did not let *Smart* know what was going on, and therefore that *Buller* is the only person liable to him. But the known course of business was to employ the firm, and the power of attorney under which the money was received was given, not to *Buller*, but to *Smart & Buller*, or either of them, and the fact of the correspondence being with *Buller* alone was owing to *Buller's* signing his own name, instead of the name of the firm, to his letters to the Plaintiff; and it further appears that the Plaintiff had no knowledge of *Buller* before the transaction in question, and he merely employed the firm because he was recommended to do so by a relative.

Upon *Smart*, therefore, falls all the responsibility of being so employed. In the case of *Blair* v. *Bromley*, which has been so much relied on (1), many letters were written to one partner individually, yet it was decided that, although *Joseph Warner Bromley* had no opportunity of knowing anything of what was being done, still he was liable; and the same decision has been arrived at in many other cases.

Being bound to arrive at the conclusion that *Smart* was, in fact, the Plaintiff's solicitor, the next question is, whether the money was received by the firm? It was received in pursuance of the power of attorney, and I consider that the moment the cheque was placed by the Accountant-General in *Buller's* hands it was money in the hands of *Smart & Buller;* and it could not, on the one hand, have been more so had *Buller* paid it into their joint banking account. The receipt by one was the receipt of both, and therefore the money was, in contemplation of law, in the hands of *Smart.*

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(1) 5 Hare, 542, 556; 2 Ph. 354.

It was, however, contended that it is not in the ordinary course of partnership business of solicitors to receive money for their clients. I quite concur in that proposition generally. But in this case the money was received in the most ordinary course of business, it being the ordinary course of business, at the end of a litigation, for the solicitors to receive the fruits of that litigation for their clients; and I should not have required any evidence on the subject, because, even if there had not been the power of attorney in this case, it could not have been said that it was not in the ordinary course of their duty as solicitors that the money was received. But there is evidence on the point, and it is also disposed of by the judgment of Lord *Lyndhurst* in *Blair* v. *Bromley,* in which it had been argued that it was not within the ordinary duty of solicitors to receive money to lay out on mortgage for their clients. Lord *Lyndhurst,* in his judgment, says (1): "Whether the Defendant knew of the transaction or not, he certainly had the means of knowing it; but neither is necessary, for the duty of laying out the money was in the ordinary course of the business of the firm, and they had undertaken it; and in that case I agree with what is laid down by the Master of the Rolls in *Sadler* v. *Lee* (2), that all the partners became liable for the several acts of each." If, therefore, in this case it had not been in the ordinary course of business, it was a duty which they had undertaken, and both, therefore, must be held liable for any miscarriage in the discharge of that duty.

It follows, therefore, that on the 29th of July, 1859, on which day the cheque was received, *Smart & Buller* became jointly and severally liable for the money so received to Mr. *St. Aubyn.*

It is then said that the liability, if established at all, can only be asserted at law; but this transaction having occurred eight years ago, and the six years having now elapsed, although the bill was filed in time, there would, from lapse of time, be no remedy for the Plaintiff at all at law.

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(1) 2 Ph. 359.
(2) 6 Beav. 330.

But upon a careful consideration of the authorities which have been cited, I am perfectly satisfied that, even if there be a remedy at law, there is also one in equity. The jurisdiction was clearly stated by Sir *James Wigram* in *Blair* v. *Bromley* (1), confirmed by Lord *Lyndhurst* on appeal (2); who, in the course of his judgment, said, that in all the cases to which he had referred, the effect of the misrepresentation raised an equity to restore the parties as nearly as possible to the same situation in which they would have stood but for the misrepresentation, and for which damages in an action at law might be a very inadequate remedy; and that the fact that an action at law would lie was no objection to such equity.

The jurisdiction of this Court was also assumed by the Master of the Rolls in *Atkinson* v. *Mackreth* (3) as a matter of course.

It was, moreover, argued that the jurisdiction in equity applied only in cases of fraud; and it was said that in *Blair* v. *Bromley* the misrepresentation was, that the money had been invested on mortgage. But if fraud is a necessary ingredient, I am of opinion that in this case there has been gross fraud.

It was the clear duty of *Buller*, the day after he received the money, to have dealt with it according to the Plaintiff's instructions; but, not having done so, he was guilty of gross fraud, both on Mr. *St. Aubyn* and his partner.

I am, therefore, of opinion that there is jurisdiction in equity, although there may be a remedy at law as well.

The case of *Coomer* v. *Bromley* (4) was one which turned not on the denial of these principles by Sir *James Parker* in the slightest degree, but one in which money was placed in the hands of the firm to invest on mortgage. Mr. *William Bromley* induced the persons entitled to the fund to appoint him a trustee, and, with their concurrence, the money was invested in his sole name, and subsequently paid to him, and Vice-Chancellor *Parker* held that the money was paid to him as trustee, and not as a member of the firm.

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(1) 5 Hare, 556.

(2) 2 Ph. 361.

(3) Law Rep. 2 Eq. 570.

(4) 5 De G. & Sm. 532.

The cases of *Viney* v. *Chaplin* (1), *Bourdillon* v. *Roche* (2), and *Re Fryer* (3), all proceed on a different principle, and do not affect the decision in the present case. *Phillips* v. *Phillips* (4), *Foley* v. *Hill* (5), and *Makepeace* v. *Rogers* (6), were simply cases of bills for an account.

I am, therefore, of opinion that, although the correspondence was with *Buller* alone, the Plaintiff employed the firm, and that, therefore, that fact does not exonerate *Smart* from liability; that the money was in the hands of the firm as soon as received by *Buller*; that it was in their hands in the ordinary course of business; and that the remedy is in equity, if not solely, at all events concurrently, with a remedy at law, and the Plaintiff is consequently entitled to the relief he seeks by his bill.

This is a very painful case, being one in which one of two innocent parties must suffer. But it must be remembered that *Smart* had the opportunity of knowing what was going on, whereas the Plaintiff had no such means of knowledge. I must, therefore, hold that the Defendant *Smart* must pay to the Plaintiff the amount claimed, with interest from the time such sum was received. The Plaintiff would have been entitled to interest at 5 per cent., but, the Plaintiff consenting to receive 4 per cent., the interest will be computed at that rate.

The Plaintiff offered very honourably to receive half the amount claimed, but the Defendant having refused to settle, as he might have done, on those terms, he must pay the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Chauntler & Crouch.*
Solicitor for the Defendant: Mr. *J. Smart.*

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(1) 2 De G. & J. 468. 4 Jur N S 619
(2) 27 L. J. (Ch.) 681. 3 Jur N S 485
(3) 3 K. & J. 317.
(4) 9 Hare, 471.
(5) 2 H. L. C. 28.
(6) 34 L. J. (Ch.) 396. 11 Jur N S 215, 314
4 De G J & S 649

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1867
Dec. 21.

FIELD *v.* CARNARVON AND LLANBERIS RAILWAY COMPANY.

Injunction—Lands Clauses Consolidation Act, 1845, *s.* 85 —*Railway Companies Act,* 1867, *s.* 36—*Compulsory Entry on Land—Deposit Money, Amount of, to be paid in.*

[illegible]
Ch D [illegible]
2 Ch D 30–2
35–9, 46

A railway company cannot avail itself of the power of entering on land before purchase conferred by the *Lands Clauses Consolidation Act,* 1845, unless there is an urgent necessity for immediate entry.

The deposit provided to be paid into Court by the 85th section of the *Lands Clauses Act,* 1845, on entry before purchase, must include not only the value of the land, but also compensation for severance, &c., to which the landowner would be found entitled by a jury, or on arbitration.

An entry subsequent to the *Companies Act,* 1867, cannot be made upon a previous valuation under the *Lands Clauses Act,* 1845.

Therefore, where a railway company had valued the land only, under the 85th section, in 1865, and had entered after the 20th of August, 1867, on depositing the amount of the valuation :—

Held, that the entry was irregular, and injunction granted restraining the company from continuing in possession of the land until the proper deposit had been made.

THIS was a motion for an injunction to restrain the *Carnarvon and Llanberis Railway Company* from entering upon or continuing in possession of land belonging to the Plaintiff, unless and until they should have made such deposit and given such bond in respect of the same as were required by sect. 85 of the *Lands Clauses Consolidation Act,* 1845, and sect. 36 of the *Railway Companies Act,* 1867.

The railway company served notice to treat for the land in February, 1865. In reply to that notice the Plaintiff sent in a claim for the land (which was a little more than two acres, and which he alleged was building land), for severance, and for deterioration of the remainder of his land, amounting together to £4827 10*s.* In July, 1865, the company had the land valued, but nothing more occurred till December, 1867, when the company deposited the amount of the valuation, £202 0*s.* 8*d.*, into Court, with bonds, as provided by the 85th section of the *Lands Clauses Act,* and entered on the land. The company's solicitor, in writing to inform the Plaintiff of this step, stated the amount of valuation so deposited, that the proceeding did not at all affect the Plaintiff's interest, for the valuation (the amount of which had been deposited) did not include compensation for severance.

The railway company shortly after such deposit entered on the Plaintiff's land, and were now constructing their line over it.

Mr. *Rodwell*, for the Plaintiff:—

The railway company's proceedings in this case have been quite irregular. Under the 85th section of the *Lands Clauses Act* they have had the land valued, but such valuation, according to the invariable practice, must include compensation for severance and otherwise—in fact, all that the landowner would be entitled to were the value agreed on, or the amount settled by any of the other modes provided by the Act: *Lands Clauses Consolidation Act,* sects. 58, 63, 85. The value of the land has increased since 1865, and the railway company cannot, after lying by for more than two years, proceed on the valuation of 1865, but must be considered as having abandoned that valuation, even if it had been regular; but the railway company not having urgent necessity to enter on the land, could not proceed at all under the 85th section of the Act.

But the 85th section of the *Lands Clauses Act* has been amended by the 36th section of the *Railway Companies Act,* 1867, which came into operation in August, 1867; and as the company cannot fall back upon their proceedings of 1865, they come within the Act of 1867, and must proceed under the 36th section of the latter Act, and have the land valued by a surveyor appointed by the Board of Trade.

Mr. *F. Waller,* for the Defendants:—

The railway company are proceeding under the 85th section of the *Lands Clauses Act,* 1845, and the Act of 1867 does not in any way apply to the case. They proceeded quite in the regular way provided by the 85th section; they served notice to treat and had the land valued, and from the time they served notice to treat they were entitled to take the land upon depositing the valuation and bonds as provided by the Act. When, therefore, they entered

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on the land in December, 1867, such entry related back to the notice to treat of 1865, which they had never abandoned, although they had not found it necessary sooner to act on it.

The 85th section of the Act of 1845 in terms provides for the deposit of the valuation of the land only, and not for any compensation to which the landowner may establish his right for severance. To secure the payment of such compensation the same section has provided that bonds shall also be given, for which there would otherwise be no necessity.

It is the duty of railway companies to resist demands so exorbitant as the present, and the policy of the 85th section was to protect railway companies from such demands by enabling them to proceed with their works without being forced to comply with them.

SIR R. MALINS, V.C.:—

[illegible]

I am of opinion that no railway company has a right to proceed under the 85th section of the *Lands Clauses Consolidation Act*, 1845, unless there is an urgent necessity for immediate entry on the land; because if there is no such necessity the landowner is entitled to have paid to him, or to have deposited, the full value of his land before the railway company touches it, such value to be ascertained in one of the modes provided by the Act. In the present case it is clear no such necessity existed, because, although the company gave notice to treat in 1865, they did not enter on the land till 1867. I am of opinion, therefore, on this ground, that the valuation made in 1865 was made at a time when they had no right to proceed under the 85th section, and that it was, therefore, irregular.

But, even if otherwise regular, I am of opinion that such valuation should include all that to which, by agreement, or by a jury, or by an arbitrator, the landowner would be found to be entitled; and, therefore, that it must include compensation for severance, &c., as well as the mere value of the land itself. If it did not do so, the section might work great injustice, for in many cases the value of the land is inconsiderable compared with the amount of compensation for severance to which the landowner would be entitled; and in many cases where railway companies become insolvent the landowner would obtain the value of the land only, and have to rely for any compensation for damages on the bond, the sureties to which might be equally irresponsible. On that ground, therefore, I am also of opinion that the valuation is irregular.

But in every case where a railway company propose entering on land under the 85th section, since the passing of the *Companies Act*, 1867, the surveyor must be appointed, under the 36th section of the new Act, by the Board of Trade, and not as provided by the former Act. In this case the railway company proposed to enter into possession after the 20th of August, 1867, and, therefore, the case comes under the new Act.

Upon all these grounds, therefore, I am of opinion that the railway company are not entitled to enter on, or continue in possession of, the land until they shall have settled with the Plaintiff for the full value, either by agreement, or shall have deposited the value which may have been ascertained by a surveyor appointed by the Board of Trade under the Act of 1867.

There must, therefore, be an injunction in the terms of the notice of motion.

Solicitors for the Plaintiff: Messrs. *Paine & Layton.*

Solicitors for the Defendants: Messrs. *Eady & Champion.*

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June 26;
Nov. 23.

reaffd ap

In re OVEREND, GURNEY, & Co.

MUSGRAVE AND HART'S CASE.

Company—Winding-up—Companies Act, 1862, ss. 35, 98—*Contract—Privity—Vendor and Purchaser—Sale of Shares—Practice of Stock Exchange—Rectification of Register—Transfer not executed by Transferee—Liquidator—Costs.*

If *A.* sells shares in a company to a member of the *Stock Exchange*, and *B.* buys shares in the same company at a different price from another member of the *Stock Exchange*, and on the name-day *B.*'s name is given to *A.* as the purchaser of *A.*'s shares, and *A.* executes a transfer of his shares to *B.*, and *B.* accepts the transfer and pays to *A.* the price for which *B.* originally bought the shares, the transaction constitutes a contract between *A.* and *B.* for the sale and purchase of the shares, which a Court of equity will compel *B.* specifically to perform.

Where the articles of association of a company require transfers of shares

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3 Ch 389
— 391
6 Eq 155
9 Eq 98
— 596
— 655
13 Eq 569, 570
24 B.D. 467
477

to be executed by both parties, the Court has no power, under ss. 35 and 98 of the *Companies Act*, 1862, to rectify the register by removing the name of a transferor, unless the transfer has been executed by the transferee.

When in the winding up of a company application is made to the Court to substitute one person for another on the list of contributories, and both parties are equally solvent, so that it is a matter of indifference to the creditors and contributories which of them is made a contributory, it is the duty of the liquidator to appear by one counsel only, and to take no part in the argument:

Semble, in such cases the unsuccessful party will be ordered to pay the costs of the liquidator.

THIS was an application by Messrs. *Musgrave*, the registered holders of thirty shares in *Overend, Gurney, & Co., Limited*, that the register of members of the company might be rectified by registering *James Hart* as the owner of those shares in the place of the applicants.

On the 18th of April, 1866, *Sebag*, a stock-broker, purchased, by *Hart's* direction, thirty shares in the company from *Horn & Crewe*, stock-jobbers, at £14 12*s.* 6*d.* per share, for delivery on the 27th of April. The shares were not delivered on the 27th of April, and *Sebag*, with *Hart's* consent, agreed to allow the delivery to be postponed to the next settling day the 15th of May, upon 2*s.* 6*d.* per share backwardation being allowed.

On the morning of the 10th of May, 1866, *Walker & Lumsden*, stock-brokers, in pursuance of instructions sent to them by Messrs. *Musgrave* on the previous day, sold for Messrs. *Musgrave* 100 shares in the company to *Morris*, a stock-jobber, at £11 15*s.* per share, for delivery on the 15th of May.

On the afternoon of the 10th of May the company stopped payment, and on the 11th a Petition for winding up the company was presented.

On the 15th of May *Hart* gave to *Sebag* the name of *Martha Street* as the purchaser of the shares purchased by his direction, and on the 16th that name was given by one *Sheppard* to *Walker & Lumsden* as the name of the purchaser of thirty of the shares sold for Messrs. *Musgrave*. There was no evidence as to the persons through whom the name of *Martha Street* was passed from *Sebag* to *Sheppard*, but *Lumsden* gave the following evidence as to the rules and practice of the *Stock Exchange*: "The selling broker of shares

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is bound upon any sale to a member, whether jobber or broker, to accept on the name-day any name given to him for insertion, unless he can shew fraud. According to the usual course the name given on the name-day is that of the last buyer. It is the duty of the same buyer to give a name, which is handed over to the broker of the first seller. The broker who so gives the name is bound to pay the purchase-money to the broker of the first seller; if he refused to do so he would be compelled by the committee. If the price named in the name-ticket differs from that at which the shares were originally sold, that difference is paid or received between the broker and the jobber in the original sale; it is a mere adjustment, and does not affect the right of the first seller to treat the name sent in as that of the actual purchaser."

On the 19th of May, Messrs. *Musgrave* executed a transfer of thirty of their shares to *Martha Street*, and on the 22nd of May *Walker & Lumsden* delivered the transfer, with the certificates of the shares, to *Sebag*, who thereupon paid them £435, being the price at which he purchased the shares on the 18th of April, less the stipulated backwardation. On the same day *Sebag* gave the transfer and certificates to *Hart*, who at first objected to pay for the shares, on the ground that the company had stopped payment; but being told that, according to the rules of the *Stock Exchange*, *Sebag* was bound to pay for the shares, and had paid for them, he gave *Sebag* a cheque for the purchase-money, writing on the cheque, "This money is paid under protest on behalf of *Martha Street*."

On the 11th of June a resolution was passed for the voluntary winding up of the company, and on the 17th of June an order was made for the continuance of the voluntary winding-up under the supervision of the Court.

The transfer was not sent to the company's office or registered, and the names of Messrs. *Musgrave* remained on the register as holders of the shares.

Messrs. *Musgrave*, being required to pay a call on the shares, and having applied to *Martha Street* for repayment, and for indemnity against future calls, ascertained that *Martha Street* was a servant of *Hart*, and that her name had been given by him without her knowledge. They thereupon made the present application.

It was admitted that both Messrs. *Musgrave* and *Hart* were solvent, and able to pay the calls.

The articles of association provided (sect. 11) that no transfer of shares should be entered on the books of the company unless duly executed by the transferor and transferee, and the transferor should be deemed to remain the holder of such shares until the name of the transferee should be entered on the register in respect thereof; (sect. 12) that the directors might refuse to register the transfer unless the transferee were approved by the board; (sect. 17) that all transfers should be deposited with the directors, or some person for the time being authorized by them in that behalf, accompanied with such evidence as the directors should require to prove the title of the transferor, and thereupon, subject to the 12th article, the directors, or such authorized person, should register the transferee as a member.

Mr. *Baily*, Q.C., and Mr. *J. N. Higgins*, for Messrs. *Musgrave*:—

Hart is the equitable owner of the shares. Before the stoppage of the company he agreed to buy, and Messrs. *Musgrave* agreed to sell, thirty shares; and by the rules of the *Stock Exchange*, subject to which both parties contracted, they were in the position of vendor and purchaser, notwithstanding the intervention of the jobbers. If, therefore, Messrs. *Musgrave* were to institute a suit for specific performance, the Court would compel *Hart* to take the shares and indemnify the vendors against future calls: *Wynne* v. *Price* (1); and that notwithstanding the winding-up: *Paine* v. *Hutchinson* (2). Nor would the Court allow him to evade his liability by procuring a colourable transfer to be made to a nominee: *Budd's Case* (3). But the Court will not put the parties to the expense and delay of a suit, being able to do complete justice by rectifying the register under the *Companies Act*, 1862. The 35th section gives the Court full jurisdiction to decide all questions of title upon applications like the present. The words which give this power were absent from the corresponding section of the Act of 1856 (19 & 20 Vict. c. 47, s. 25), and were added in consequence of the decision in *In re British Sugar Refining Company* (4), that under the former Act the Court could not try such questions. The jurisdiction has been assumed by several branches of this Court: *Emmerson's Case* (1); *Nation's Case* (2); *Webster's Case* (3); *Stewart's Case* (4); *Ward and Garfit's Case* (5); and by the Court of Appeal: *Emmerson's Case* (6); though it was denied by Lord *Cairns* in *Ward and Henry's Case* (7). Moreover, as this is a voluntary winding-up, the Court may, under the 138th section, "determine any question arising in the matter of the winding-up." It has been decided at law that the 153rd section does not make transfers after the commencement of the winding-up illegal, and that contracts for such transfers may be enforced: *Chapman* v. *Shepherd* (8); *Biederman* v. *Stone* (9). The liquidators may sanction such transfers (sect. 131), and it was their duty in this case, for the benefit of the company, to accept *Hart* as the transferee, retaining their right against Messrs. *Musgrave* as past members of the company. It was the duty of *Hart*, the real transferee, to procure the registration of the transfer: *Stray* v. *Russell* (10).

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(1) 3 De G. & Sm. 310.

(2) Law Rep. 3 Eq. 257.

(3) 3 D. F. & J. 297.

(4) 3 K. & J. 408.

Mr. *Roxburgh*, Q.C. (with him Mr. *Ferrers*), for the liquidators:—

Whatever may be the right of the applicants against *Hart*, they have no right as against the company to be removed from the list. By the articles of association they contracted to remain shareholders until a transfer of their shares had been executed by transferor and transferee, left at the office, and approved by the directors, and the name of the transferee had been entered on the register. Here, at the commencement of the winding-up, the transfer had not been executed by either party; it has never been executed by the transferee or left at the office, and it cannot now be approved by the directors. Neither the liquidators nor the Court can exercise the discretion given to the directors by the articles. Where, before the winding-up, the transfer has been executed and left at the office, and the directors have neglected to exercise their discretion either by approving or disapproving of it,

(1) Law Rep. 2 Eq. 231. 12 Jur NS 494
(2) Ibid. 3 Eq. 77.
(3) Ibid. 2 Eq. 741.
(4) Ibid. 1 Ch. 574. 12 Jur NS 574
(5) Ibid. 4 Eq. 189.
(6) Law Rep. 1 Ch. 433. 12 Jur NS 592
(7) Ibid. 2 Ch. 431.
(8) Law Rep. 2 C. P. 228.
(9) Ibid. 504.
(10) 1 E. & E. 888, 916, 6 Jur NS 168.

the Court holds that there has been unnecessary delay on their part; and if there is no reason why the transfer should have been disapproved, the Court puts the parties in the same position as if it had been approved, and places the name of the transferee on the register and list of contributories. But where the directors have had no opportunity of exercising their discretion, and have been guilty of no delay, the Court cannot dispense with the provisions of the articles. There is no case in which the Court has altered the register where the transfer has not been left at the office before the winding-up.

The 35th section of the *Companies Act* only applies to cases where the rectification of the register is necessitated by the default of the company. The remedy of the applicants is a bill against *Hart* for indemnity. In the present case it is immaterial to the shareholders and creditors whether the applicant or *Hart* are placed on the list, both parties being solvent; but the liquidators feel bound to object to the general proposition that a contract for the sale of shares entitles the vendor to have the purchaser's name placed on the list of contributories where no transfer has been executed, and the directors have had no opportunity of accepting or rejecting the transferee.

Mr. *Cotton*, Q.C., and Mr. *Westlake*, for *Hart*:—

First: there has been no contract between Messrs. *Musgrave* and *Hart*. The only contract entered into by *Hart* was the contract with *Horn* and *Crewe*, on the 18th of April, to purchase thirty shares at £14 12*s.* 6*d.* per share, afterwards varied, by allowing backwardation, to £14 10*s.* per share; the only contract entered into by Messrs. *Musgrave* was the contract with *Morris*, on the 10th of May, to sell thirty shares for £11 15*s.* per share. It may be that, according to the rules and practice of the *Stock Exchange*, brokers and jobbers so arrange their dealings that the shares are transferred direct from the first vendor to the last purchaser, and adjust the difference of price among themselves; but those rules and practice cannot have the effect of creating contract or privity between two persons each of whom has made a distinct and independent contract with different persons. The difference in the purchase-money is alone sufficient to preclude any such implied contract. The payment of the purchase-money by *Sebag* to Messrs. *Musgrave's* brokers, and the repayment to *Sebag* by *Hart*, do not affect the question of contract between *Hart* and Messrs. *Musgrave; Sebag* was bound by the rules of the *Stock Exchange* to pay for the shares according to the directions of the jobbers from whom he purchased them : *Stray* v. *Russell* (1); and *Hart* was bound to indemnify his own agent: *Taylor* v. *Stray* (2). Therefore, even if the company had not been wound up, neither Messrs. *Musgrave* nor *Hart* could have maintained a suit against the other for specific performance.

Secondly: Even if there had been a contract by *Hart* to purchase the shares, of which this Court would have enforced specific performance at the suit of Messrs. *Musgrave*, this is not a case for rectifying the register of shareholders under s. 35 of the *Companies Act*, 1862. No name has been "without sufficient cause entered in or omitted from the register," nor has "default been made, or unnecessary delay taken place, in entering on the register the fact of any person having ceased to be a member of the company." There is, therefore, no ground for any "proceeding under that section," and consequently the jurisdiction thereby given to the Court to decide questions of title between members or alleged members does not arise. The fact that the section empowers the Court to direct the company to pay costs, but not to give costs against any other person, except an applicant whose application is refused, shews that it was not intended to apply to cases for specific performance of contracts for the purchase and sale of shares. It was so construed by Lord Justice *Cairns* in *Ward and Henry's Case* (3); and though Lord Justice *Turner* put a wider construction on the section, he thought that few cases of specific performance could properly be dealt with under it. In *Emmerson's Case* (4) the Lords Justices refused to exercise the jurisdiction where there had been a *bonâ fide* contract, but the shares had not been completely transferred. In *White's* and *Head's Cases* (5) the Master of the Rolls held that, though as between the contracting parties the Court might have decreed specific performance, it would not alter the register so as to affect the company and the other shareholders.

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(1) 1 E. & E. 888, 916. 6 Jur. N.S. 1160
(2) 2 C. B. (N.S.) 175, 197. 3 Jur. N.S.
540, 964
(3) Law Rep. 2 Ch. 431.
(4) Ibid. 1 Ch. 433. 12 Jur. N.S. 592
(5) Law Rep. 3 Eq. 84.

In *Shepherd's Case* (1) the Court refused to place the transferee's name on the register, though the transfer was executed by both parties before the winding-up, on the ground that there had been no unnecessary delay or default on the part of the company in altering the register. In *Ward and Garfit's Case* (2) the transfer was executed by both parties and left for registration before the winding-up; but here, if there was a contract between *Hart* and Messrs. *Musgrave*, it was not made until after the commencement of the winding-up, and the case is exactly covered by *Walker's Case* (3). The 98th section of the *Companies Act*, 1862, empowers the Court to rectify the register only where rectification is required in pursuance of the Act—that is to say, under the 35th section; in the 38th section the words "past and present member" refer to the commencement of the winding-up, and at the commencement of this winding-up *Hart* had not agreed to become a member in respect of the shares in question; he was, therefore, not then a member (sect. 23), and consequently is not liable to contribute (sect. 38), and cannot be made a contributory (sect. 74); on the other hand, Messrs. *Musgrave* were on the register as members in respect of these shares, which they had agreed to hold until the name of a transferee was registered, and had not transferred them. The 131st section applies only to voluntary winding up, and the 153rd section, though it gives the Court a discretion to allow transfers to be made after the commencement of the winding-up, which, as a general rule, it makes void, does not otherwise alter the effect of the transfer, so as to dispense with the approval of the directors and the execution by the transferee: *Emmerson's Case* (4). In *Bermingham* v. *Sheridan* (5) the Court refused to interfere even in a suit for indemnity, the official liquidator having, as in this case, declined to accept the transferee. In *Paine* v. *Hutchinson* (6) the bill was filed before the commencement of the winding-up; in *Wynne* v. *Price* (7) there was a clear contract between the parties through their agents, and no question of winding up. *Chapman* v. *Shepherd* (8), *Whitehead* v. *Izod* (8), and *Biederman* v.

12 Jur N.S. 698, 897.

(1) Law Rep. 2 Eq. 564; 2 Ch. 16.
(2) Ibid. 4 Eq. 189.
(3) Ibid. 2 Eq. 554.
(4) Ibid. 1 Ch. 433. 12 Jur N.S. 592
(5) 33 Beav. 660.
(6) Law Rep. 3 Eq. 257.
(7) 3 De G. & Sm. 310.
(8) Law Rep. 2 C. P. 228.

Stone (1), only decide that, as between brokers and their principals, contracts for the sale of shares after the commencement of the winding-up of a company are not necessarily void. In *Ship's Case* (2) and *Stewart's Case* (3) the question was, whether the applicants ever became members of the company. In *Budd's Case* (4), and all the other cases of that class, the burden was upon a person who had been a shareholder of proving that he had relieved himself from his liabilities; here the burden is upon Messrs. *Musgrave* of proving that *Hart* has become the holder of their shares. We do not rely on the fact that the transfer was made to *Martha Street*, but the fact of *Hart* having used her name does not affect the question either way. [They also referred to *Robinson* v. *Chartered Bank* (5).]

Mr. *Baily*, in reply:—

The arguments against the validity of the contract are merely technical. Every buyer or seller of shares on the *Stock Exchange* knows that the real parties to the contract are not the brokers or jobbers, but the persons whose names are brought together on the name-day. The provisions of the articles of association, requiring the approval of transfers by the directors, are superseded by the winding-up of the company; and the liquidators, in the case of a purely voluntary winding-up, or the Court, in the case of a winding-up by or under the supervision of the Court, have the power and duty of approving or rejecting transfers, and if both parties are solvent, so that the interests of the creditors and the company are safe, the Court will decide according to their rights *inter se*. The jurisdiction of the Court has recently been established in this branch of the Court: *Ward and Garfit's Case* (6). *Walker's Case* (7) is inconsistent with the other authorities, and cannot be supported. The other cases in which the Court has refused to rectify the register have turned upon the refusal of the directors to accept the transfer, or the laches of the applicant.

Mr. *Cotton* gave His Honour the shorthand writer's note of the judgments in *Marino's Case* (8), then not reported.

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(1) Law Rep. 2 C. P. 504.
(2) 2 D. J. & S. 544. 11 Jur NS 331
(3) Law Rep. 1 Ch. 574. 12 Jur NS 574
(4) 3 D. F. & J. 297.
(5) Law Rep. 1 Eq. 32.
(6) Ibid. 4 Eq. 189.
(7) Ibid. 2 Eq. 554.
(8) Ibid. 2 Ch. 596.

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The Vice-Chancellor, at the close of the argument, expressed his opinion that there was a contract between the parties, but reserved his judgment upon the question of jurisdiction.

Nov. 23. Sir R. Malins, V.C.:—

In this case I deferred giving my judgment until the judgment in the House of Lords should have decided whether there were or were not any shareholders at all in *Overend, Gurney, & Co.* It having been now determined that the shareholders are contributories, it becomes necessary for me to decide this case.

[His Honour then stated the facts, observing that it was clearly established that *Hart* had instructed his broker to give the name of *Martha Street* for the purpose of evading the liability to calls which he believed himself to have incurred as the purchaser of the shares, and continued:—]

It was contended by the counsel for Mr. *Hart*, that there was no contract between Messrs. *Musgrave* and Mr. *Hart;* but Mr. *Hart* intended to buy thirty shares in this company, and it was perfectly unimportant to him of whom he bought them, and the acceptance of the transfer from Messrs. *Musgrave* is, in my opinion, a conclusive admission that it was from them that the purchase was made, and the difficulty on that point is thus removed. The subsequent diminution in the value of the shares from a cause of which both parties were in perfect ignorance at the time of the contract, affords no excuse for its non-performance. There was, therefore, I think, a binding contract between Messrs. *Musgrave* and Mr. *Hart*, of which I should have been bound to decree specific performance if the case had been brought before me by a bill to enforce the contract. I accordingly expressed my opinion, on the conclusion of the argument, that Mr. *Hart's* name ought to be substituted for those of Messrs. *Musgrave* in the list of contributories of the company, and I reserved my judgment that I might examine the numerous authorities which were cited, in order to ascertain whether they left me at liberty to exercise my own judgment upon the point, or whether I was bound by a decision of the Court of Appeal to leave the names of Messrs. *Musgrave* on the list.

The question depends upon the 35th section of the *Companies Act*, 1862. Now, the language of that section is very extensive. The first part of it is evidently directed to a state of things anterior to the winding-up of a company, and is directed to any delay or default on the part of the company, that being one case distinctly provided for. If that had been the sole object of the section, it would have stopped there; but it goes on to provide that the Court may in any proceeding under the section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in, or omitted from, the register, whether such question arise between two or more members or alleged members, or between any members or alleged members of the company; and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register. Now, upon that language it seems to me that the intention of the Legislature was to arm the Court with the most complete power of settling who were or who were not shareholders in a company, and this is followed up by the 98th section, which gives the Court, in settling the list of contributories, power to rectify the register of members in all cases where such rectification is required in pursuance of the Act.

2 QBD 4

My own opinion is, that it is most beneficial in all enactments of this kind that a fair and liberal interpretation should be put upon the language of the Legislature; and it being greatly to the advantage of the litigants that, where the facts are undisputed, the question should be decided as speedily and cheaply as possible, I have no doubt in my own mind that the object of the Legislature was that which I think was a most beneficial one—to give the Court, upon a summary proceeding, the power of deciding questions of this kind. Of course the Court must exercise its discretion, and if there were a point not clearly ascertained the Court would stop the summary proceeding, reserving the question until it could be decided in a more formal manner, taking care somehow or other that justice should be done between the parties. Therefore, my own opinion is, that the Act gives the Court a power to decide

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all questions, not only between the company and its members, but between the members and alleged members themselves, for the purpose of finally settling the list of contributories. I may state that in the present case the official liquidators who represent the company state that they are indifferent whether the Messrs. *Musgrave* remain on the list or whether Mr. *Hart's* name is substituted for their names, being satisfied that both parties are equally capable of meeting any demands that may be made upon them. It is, therefore, a case in which no injury can arise to the other shareholders; but, as a general principle, I conceive that no practical inconvenience can arise from altering the register, for the company will as often be benefited by the introduction of a more substantial shareholder as it will suffer by the introduction of a less substantial one, the probability being that, as a class, purchasers would be more substantial than sellers, and all mere colourable transfers, like the present, made for the purpose of evading liability, would be avoided by the decision in *Budd's Case* (1), which decided that such transfers are void as against the company. There would, therefore, be no danger of the company suffering by the introduction of pauper shareholders in the place of those who are able to answer the demands made upon them.

But, however clear my own opinion may be, it is my duty to defer to that of the Court of Appeal, if it has been clearly expressed. There was certainly a considerable conflict of opinion on the construction of the 35th section when this case was argued in June last. [His Honour then read passages from the judgments of Lord Justice *Turner* in *Stewart's Case* (2), *Emmerson's Case* (3), and *Ward and Henry's Case* (4), and from the judgment of Lord Justice Lord *Cairns* in the latter case, shewing that in all those cases Lord Justice *Turner* had expressed an opinion in accordance with His Honour's opinion upon the question of jurisdiction to rectify the register, whereas Lord *Cairns* had expressed a totally opposite opinion, and continued:—]

The opinions, therefore, of the two Lords Justices in *Ward and Henry's Case* are diametrically opposed to each other; and if this remarkable conflict of opinion between the members of the

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(1) 3 D. F. & J. 297.

(2) Law Rep. 1 Ch. 574, 585. 12 Jur N S 753, 756

(3) Law Rep. 1 Ch. 433, 435. 12 Jur N S 57

(4) Ibid. 2 Ch. 431, 436, 441.

Court of Appeal had continued, I should have been at liberty to exercise my own judgment upon the point, and I should then certainly have put Mr. *Hart's* name upon the list of contributories. But there is a later case of the greatest importance, which was not reported at the time of the argument: I refer to *Marino's Case* (1). In that case *Marino* was a registered shareholder of the company, and *Issaverdens*, a resident at *Smyrna*, had written to the company, who were also his agents, to purchase shares for him in the company, and accordingly a contract was entered into by which *Issaverdens* accepted the shares bought by the company, acting as his agents, on his behalf. The shares to which the application related were bought by the company from *Marino*, through Messrs. *Ionides & Barker*, brokers, on the 2nd of May, in pursuance of the directions of *Issaverdens*. On the 4th of May *Marino* executed a transfer of the shares to *Issaverdens*, and gave it to *Ionides & Barker*, who, on the 7th of May, forwarded it to the office of the company. So that here is a case in which the intended contract is entered into by the brokers on behalf of *Issaverdens*, the transfer actually executed by *Marino* and sent to the company for registration, but not registered. Vice-Chancellor *Wood* in that case had removed the name of *Marino* and put on the name of *Issaverdens*, but before the Lords Justices evidence was given that, although the company had not adopted the schedule in the Act which makes it imperative that the transfer should be executed by the transferor and the transferee, that had been the uniform usage. There was, therefore, this defect, that, while the transfer was executed by the seller and sent to the company for registration, it had not been executed by the purchaser, *Issaverdens*. Under these circumstances the case came before the Court of Appeal. Now, in that case Lord Justice *Turner* says (2):—"The case therefore really stands thus: the Respondent has to make out that the company was guilty of default in not taking his name off the register, although, according to their ordinary practice, his name could not be taken off except upon production of a deed executed, not only by himself as the transferor of the shares, but by the person to whom he transferred them. It would be a very strong and very dangerous decision to hold that the company were bound to

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(1) Law Rep. 2 Ch. 596.

(2) Law Rep. 2 Ch. 598.

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deviate from the practice which they had always pursued, without any sufficient reason being laid before them to induce that deviation, and upon that ground alone I think we should be justified in differing from the opinion of the Vice-Chancellor, which probably would not have been the same had the facts which we have before us been before him." And he thus concludes his judgment:—"It could not have been done by the mere fact of the purchaser being put upon the register, because, if he were put upon the register without his having executed the deed, he might at some future time dispute his having given authority to place his name there, and ask to have it removed, and so expose the vendor to future liability in respect of the shares. Upon that ground, therefore, even apart from the consideration to which I have before adverted as to the practice which had been pursued by the company, I am rather disposed to think that *Marino* must continue upon the register, and seek his remedy, if remedy he has, against *Issaverdens*." There is a passage in the shorthand notes of Lord Justice *Turner's* judgment, which is not given in the report, which I cannot but think materially influenced the judgment at which he arrived. It is this:—"The real question is, whether the liability is to be shifted from *Marino*, who is solvent, to *Issaverdens*, who is insolvent; whether the company are to take the consequences of *Issaverdens'* insolvency or to keep *Marino*. I think they must keep *Marino*." That, I cannot but think, had a considerable influence on the Court. I have already met that point. In the view I take of the case, it is no use deciding these matters by an individual case. The Court of Appeal having thus decided that they would not alter the register simply because the transfer had not been executed by the transferee, I am bound to follow that decision, and I cannot, therefore, as I should have desired to do, substitute the name of Mr. *Hart* for the names of Messrs. *Musgrave* on the list of contributories. The Master of the Rolls, in *Head's Case* and *White's Case* (1), has also decided that the register, as it stood at the time of the winding-up, could not be altered, lest doing so should prejudice the other shareholders; that is a conclusion which is opposed to many of the decisions of the Master of the Rolls himself; he has repeatedly altered the register irrespective of the interest of the other share-

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(1) Law Rep. 3 Eq. 84, 86.

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holders; he did so in *Ward's Case* (1), and, therefore, I confess I am somewhat at a loss to reconcile these decisions of the Master of the Rolls with his frequently expressed opinion, acting on which he has altered the register; that, however, is the opinion which he ultimately expressed. Under these circumstances I must reluctantly leave Messrs. *Musgrave* to assert what remedies they have against Mr. *Hart* by bill for specific performance and indemnity, or as they may be advised. The present application must, therefore, be refused; but, considering the conduct of Mr. *Hart*, it certainly must be so without costs.

Mr. *Roxburgh* asked that the costs of the liquidators might be paid by Messrs. *Musgrave*, and that the assets of the company should not be diminished by the costs of a contest between two contributories, or alleged contributories.

Mr. *Higgins* contended that, as there was no advantage to the creditors or contributories in retaining Messrs. *Musgrave* as contributories, *Hart* being perfectly solvent, the liquidators ought to have sanctioned the transfer, which they might have done under the 131st section of the *Companies Act*, 1862, and to have taken no part in the present contest.

Mr. *Roxburgh*, in reply, submitted that in all proceedings in the winding-up it was the duty of the liquidators to give the Court all the assistance in their power in deciding the question, and that it had been the established practice, in questions between alleged contributories, for the liquidators' counsel to take part in the argument.

SIR R. MALINS, V.C.:—

I am not aware whether the point has called for decision before, but there are certain broad principles by which we can never be very well misled. The liquidators in this case appeared before me, and undoubtedly their counsel did argue this case (and I thought at the time, and still think, that it was unnecessary) upon the question whether the one or the other of these names should be on the list, telling me they were perfectly indifferent

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(1) Law Rep. 2 Eq. 226. 12 Jur NS 493.

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whether the one or the other was there. Now, under these circumstances, for the official liquidator to instruct two counsel to tell me that he was perfectly indifferent between the parties, was, in my opinion, a misconception; but, assuming the representation of the liquidators by counsel to be necessary in a matter between litigant parties about whom they are indifferent, their duty would have been perfectly discharged if they had instructed one counsel to appear, declining to take any part in the argument, to tell me that they were indifferent as to which of the two parties should be on the list. I can, therefore, only allow the costs of one counsel. Then the question is, by whom the costs of the one counsel should be paid. I was at first inclined to think that they should come out of the estate; but the conclusion at which I have arrived is this: as between Messrs. *Musgrave* on one side, and the liquidators on the other, I shall allow the costs of only one counsel; and upon the principle adverted to by Mr. *Roxburgh*, that it would be unjust that the shareholders should bear the costs of a litigation in which they had no interest, the costs of the liquidators to that extent must be paid by Messrs. *Musgrave*. There remains the question, what is to be done about the other costs incurred by the official liquidator. I have said that I think it a misconception to have instructed two counsel to take part in the argument, and I hope that what has occurred to-day will be a precedent for avoiding that course in future; but as the liquidators' solicitors were probably justified in what they did, as being the course that had been adopted in previous cases—and in the case of *bonâ fide* conduct, where a mistake has been made by the liquidators, it would be hard to throw the consequences of the mistake on themselves—I shall in this instance give the difference of the costs out of the estate.

Solicitors for the Applicants: Messrs. *Lewis, Munns, Nunn, & Longden.*

Solicitors for the Liquidators: Messrs. *Maynard, Son, Markby, & Denton.*

Solicitors for *Hart:* Messrs. *W. & H. P. Sharp.*

In re COCHRAN'S ESTATE.
DE WOLF *v.* LINDSELL.

M. R.
1868
Jan. 21.

4 Ch 736

Mercantile Law Amendment Act (19 & 20 *Vict.* c. 97), s. 5—*Principal and Surety—Contract prior to passing of Act—Subsequent Breach and Payment.*

Section 5 of the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97) applies to a contract entered into before the passing of the Act, provided a breach of it has taken place, and payment has been made by the surety after the passing of the Act.

In 1854, *W.*, as surety, joined in a bond with *C.* The Act was passed in July, 1856. In December, 1856, the condition of the bond was broken, and *W.* paid the amount due on the bond in January and April, 1857:—

Held, that *W.* was entitled to rank as a specialty creditor of *C.*

IN 1854 Mr. *De Wolf*, as surety, joined with Mr. *Cochran* in a joint and several bond to secure a sum of £2000 and interest.

On the 29th of July, 1856, the Act 19 & 20 Vict. c. 97, was passed (1).

In December, 1856, the condition of the bond was broken, and *Cochran* absconded from this country. Immediately afterwards *De Wolf* was called upon to pay the £2000. He accordingly paid £1000 in January, 1857, and £1000 and interest in the following April.

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(1) Sect. 5 is as follows:—"Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt, or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made, and loss sustained by the person who shall have so paid such debt, or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

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v.
LINDSELL.

In May, 1862, *Cochran* died. In 1867, *De Wolf* took out a summons for the administration of his estate, which was adjourned into Court. The question was, whether *De Wolf* was entitled, under the above Act, to rank as a specialty creditor of *Cochran*.

Mr. *Baggallay*, Q.C., in support of the summons, cited *Lockhart* v. *Reilly* (1).

Mr. *Schomberg*, Q.C., and Mr. *Smart*, for *Cochran's* administrator:—

The simple question is, whether sect. 5 of the Act 19 & 20 Vict. c. 97, is retrospective. The point was not decided in *Lockhart* v. *Reilly*, though a dictum of the Lord Chancellor to that effect is to be found in that case. In *Thompson* v. *Waithman* (2) Vice-Chancellor *Kindersley* held that sect. 14 was retrospective. This decision was followed by the Court of Queen's Bench in *Jackson* v. *Woolley* (3); but this case was reversed in the Exchequer Chamber (4). In *Flood* v. *Patterson* (5) your Lordship held that sect. 12 is not retrospective. In *Williams* v. *Smith* (6) it was held that sect. 1 did not apply to a case where a writ had been delivered to the sheriff before the passing of the Act, although it was not executed until after. The true rule as to the construction of statutes is laid down in *Moon* v. *Durden* (7). Lord *Cranworth* there cited Lord *Coke's* maxim "*Nova constitutio futuris formam imponere debet, non præteritis*:" and says, "The principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." There is nothing in sect. 5 of this Act to shew that the Legislature meant to alter the relation of principal and surety under contracts existing at the passing of the Act.

In *Gillmore* v. *Shooter* (8), it was held that sect. 4 of the *Statute of Frauds*, which enacts that no action shall be brought upon an agreement made in consideration of marriage unless it be in writing, did not apply to agreements made before the passing of the Act. In *Ashburnham* v. *Bradshaw* (1), a will made before the *Mortmain Act* contained a devise to charitable uses; the testator died after the passing of the Act, but the devise was upheld; so also *Attorney-General* v. *Lloyd* (2), and *Attorney-General* v. *Andrews* (3).

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(1) 1 De G. & J. 464.
(2) 3 Drew. 628. 2 Jur. N.S. 1080
(3) 8 E. & B. 778. 4 Jur. N.S. 409
(4) Ibid. 784. 4 Jur. N.S. 656
(5) 29 Beav. 295. 7 Jur. N.S. 924
(6) 2 H. & N. 443. 3 Jur. N.S. 10
(7) 2 Ex. 22, 33.
(8) 2 Mod. 310.

Mr. *Baggallay*, in reply:—

The cases cited on the other side are consistent with the position for which I contend. Everything depends on the meaning attached to the word "retrospective." When it is said that an Act is not to have a retrospective effect, all that is meant is, that acts or circumstances which are to give rise to the operation of the Act must be done or exist after the passing of the Act. In *Cornill* v. *Hudson* (4) it was held that sect. 10 of this Act applied to cases where the cause of action accrued before, but the action was not brought until after the passing of the Act.

In *Jackson* v. *Woolley* (5) the payment relied on was made before the passing of the Act, and therefore sect. 5 was held not to apply.

The cases upon the *Mortmain Act* have no bearing on the present case; for under the old law a will spoke from its date, not from the death of the testator. Again, the cases on the *Statute of Frauds* were rightly decided; for under a promise made before it was passed a vested right had accrued to the promisee which could not be taken from him except by express enactment.

But the very point now in question was decided in *Lockhart* v. *Reilly* (6). There a payment made after the Act under a contract entered into prior to the Act was held to call sect. 5 into operation. That section must plainly be construed as enacting that where a payment is, subsequently to the Act, made by a person liable as surety at the time of payment, the surety is to have certain rights. Such a construction does not give a retrospective, but a prospective operation to the Act.

Lord Romilly, M.R.:—

I am of opinion that Mr. *De Wolf* is entitled to an order, and that he is entitled to the benefit of the 5th section of the

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(1) 2 Atk. 36.
(2) 3 Ibid. 551.
(3) 1 Ves. Sen. 225.
(4) 8 E. & B. 429. 4 Jur N.S. 409
(5) Ibid. 778. 4 Jur NS 650
(6) 1 De G. & J. 464.

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DE WOLF *v.* LINDSELL.

19 & 20 Vict. c. 97. The Act in question is not what is commonly called retrospective: it was not intended, for example, to apply to actions going on at the time when it was passed; that was decided in the case of *Williams* v. *Smith* (1), which was cited to me. But the question here is, whether the Act applies to contracts then existing. If I adopted the construction placed on the section by Mr. *Schomberg*, the consequence would be, that if before the passing of the Act a person entered into a contract to pay a sum of money, and another became surety and agreed to pay in case the principal made default, and then default is made many years after the passing of the Act, the surety is not entitled to the benefit of it. I do not think that is the meaning of the section. I think it applies to all cases where there is a breach of the contract and a payment made after the passing of the Act.

In this case the contract was entered into in 1854. In December, 1856, *Cochran* absconded. The Act had been passed in July of that year. Immediately afterwards *De Wolf* was called upon to pay, and he paid accordingly, in January and April, 1867. There can be no question, therefore, that the breach of the contract and the payment both took place after the passing of the Act.

And the 5th section is this:—[His Lordship read the section.]

De Wolf, who was liable with *Cochran* to pay a debt, paid it after the passing of the Act, and is therefore entitled to have the bond assigned to him, and to stand in the place of the creditor, and to use the name of the creditor in any action or proceeding at law or in equity in order to obtain indemnification for the advances made by him. I agree that means a proceeding after the passing of the Act; but every person who, being a surety at the time of the Act, pays afterwards, is to be entitled to use the name of the creditor in any subsequent proceeding. That is not a retrospective enactment, except in so far as it modifies existing contracts, and from the 3rd and 4th sections, it appears to me that this was intended. In sect. 3 it is enacted, that "no special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing and signed . . . shall be deemed invalid . . . by reason only that the consideration does not appear in writing." That applies only to promises made after the passing of the Act. But sect. 4 is, "no promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise." Why in that section does the Legislature omit the words "to be made after the passing of this Act"? The answer is, that the section must be intended to apply to promises then existing; these are to be affected by the Act: but promises to answer for the debt of another made before the passing of the Act are not to be affected by sect. 3, which makes an express distinction between such promises and promises made after the passing of the Act. Then sect. 5 goes on "every person . . . shall be entitled," that is, immediately after the passing of the Act, provided the breach takes place after the passing of the Act. That seems to have been the decision in *Lockhart* v. *Reilly* (1). The Act, although not retrospective, gives a surety a remedy which he had not before: and, therefore, I think there must be the ordinary decree for the administration of *Cochran's* estate.

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(1) 2 H. & N. 443. 3 Jur NS 1082

Solicitors: Messrs *Ellis, Parker, & Clarke*; Mr. *Sealy.*

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(1) 1 De G. & J. 464.

M. R.
1868
Jan. 18, 20.

In re BREECH-LOADING ARMOURY COMPANY.

CALISHER'S CASE.

Company—Winding-up—Limited Company—Contributory—Set-off against Call made before Winding-up—Companies Act, 1862, *s.* 101.

10 Eq 326, 330.
14 Eq 449, 450
451-2
7 Ch D. 596
603

A contributory of a limited company being wound up by the Court under the *Companies Act*, 1862, is not entitled, in the absence of special agreement, to set off money due to him from the company against a call made before the winding-up.

Whether such an agreement would be *intrà vires, quære.*

THIS was an application by the official liquidator of the *Breech-loading Armoury Company, Limited*, a company formed and regisgistered under the *Companies Act*, 1862, and now being wound up by the Court under an order made on the 28th of July, 1866, for an order for the payment by *Nathan Jacob Calisher*, a contributory in respect of 100 shares, of £300, the amount of a call made upon his shares before the winding-up, with interest at 10 per cent., the rate specified by the articles of association, from the 3rd of July, 1866, when the call was payable.

In answer to the application *Calisher*, who had been the manager of the company, made an affidavit stating that the directors had induced him to allow ninety of the shares held by him to be placed in his name upon the understanding and arrangement that all sums of money payable, or to become payable, in respect of calls thereon, should be charged against his account with the company, and that he should not be called upon to make any cash payments in respect thereof, that pursuant to such understanding a previous call of £9 per share was debited to his account in the books of the company, and that the company was at the time of making the call, and still, indebted to him in upwards of £10,000.

The official liquidator stated that he could not find in any of the books or papers of the company any minute or resolution of, or reference to, the alleged understanding or arrangement; but one of the books contained an account between *Calisher* and the company in which he was debited with the previous call, and credited with the amount of his salary as manager, and with advances

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made to the company, some of which were subsequent to the £3 call; but there was no entry of the £3 call.

It was stated at the bar that the company had purchased their property and business from *Calisher*, and that there were several questions as to which a suit was pending between him and the company.

Mr. *Southgate*, Q.C., and Mr. *Swanston*, for the official liquidator:—

There is no evidence, except *Calisher's* own statement, of the agreement which he sets up, and he himself only calls it an understanding or arrangement. But if the directors had made any such agreement, it would have been *ultrà vires* and void. The 101st section of the *Companies Act*, 1862 (1), impliedly prohibits the set off, after a winding-up order, of moneys due from a limited company to a contributory against money due from him to the company: *Grissell's Case* (2).

Mr. *Jessel*, Q.C., and Mr. *Cottrell*, for *Calisher*:—

First: *Calisher* is entitled to the set-off independently of special contract. The company is a corporation, and its members, in respect of independent dealings and contracts with it, stand on the same footing as strangers. If, therefore, before the winding-up the company had sued *Calisher* for the call, he might have pleaded the debt due to him from the company by way of set-off,

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(1) This section enacts as follows:—"The Court may at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories directing payment to be made in manner in the said order mentioned of any moneys due from him, or from the estate of the person whom he represents, to the company, exclusive of any moneys which he, or the estate of the person whom he represents, may be liable to contribute by virtue of any call made, or to be made, by the Court in pursuance of this part of this Act; and it may in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him, or the estate which he represents, from the company on any independent dealing or contract with the company; but not any moneys due to him as a member of the company in respect of any dividend or profit: Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls."

(2) Law Rep. 1 Ch. 528. 12 Jur NS 710

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and he cannot be deprived of that right by the winding-up, unless under some clear statutory provision. The 101st section, which is relied on by the other side, contains no such provision; its object is to substitute for the ordinary action at law a more summary and inexpensive process for recovering money due to the company from its members, but not to deprive members of their legal rights. The clause relating to set-off in the case of unlimited companies was intended to prevent the set off of dividends and profits, and there is no prohibition of set-off in the case of limited companies. In *Grissell's Case* (1) it was laid down that the Act makes no distinction between a creditor who is and one who is not a member of the company; the observations in the judgment in that case upon the 101st section were mere *dicta*, and appear to have been made upon the erroneous supposition that the section applied to calls made under the winding-up. The final clause of the section is absolute nonsense, for it provides that a set-off shall be allowed after all the creditors (which includes those who are contributories) have been paid; that is to say, when there is nothing left to be set off. The Court will not, upon a section so obscurely worded, hold that a contributory is deprived by implication of a right acquired before the winding-up.

Secondly: He is entitled to the set-off under an agreement made by the directors on behalf of the company. His evidence to that effect is uncontradicted, and is supported by the entries in the books. The directors had full power to make the agreement, and the 101st section of the Act, at all events, was not intended to interfere with contracts between the company and its members.

Mr. *Southgate*, in reply:—

Limited companies are the creatures of the statute, and must be regulated exclusively by the statute. *Grissell's Case* has settled that a contributory of a limited company cannot set off debts due to him, even against calls made under the winding-up, to which the 101st section does not apply, and the same rule must apply *à fortiori* to the case of a call made before the winding-up, which is clearly within the section. In *Garnett and Moseley Gold Mining Company* v. *Sutton* (2) the plea of set-off was allowed under the express provision of 21 & 22 Vict. c. 60, s. 17, but the *Companies Act*, 1862, which repeals that Act, contains no such provision.

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(1) Law Rep. 1 Ch. 528. 12 Jur NS 718

(2) 3 B. & S. 321. 9 Jur NS 554

Jan. 20. Lord Romilly, M.R.:—

The question raised upon this summons is a question of set-off, depending on the combined effect of the general law and the 101st section of the *Companies Act*, 1862. The Respondent *Calisher* claims to set off against a call made upon his shares before the winding up of the company, which is a debt due from him to the company, all debts due to him from the company. He makes this claim, first on the ground of the general law of set-off, and secondly on the ground of special contract. The 101st section of the Act, upon which this question mainly depends, is very imperfectly framed; indeed it contains one clause, the last (which, however, does not affect this case), upon which it is difficult to put an intelligible construction consistently with the decision of the Court of Appeal that the word "creditors" includes creditors who are also contributories. It is clear that the section applies to the present case; an order has been made for winding up the company, *Calisher* is a contributory, the call is money due from him to the company, and it is not money which he is liable to contribute by virtue of any call made by the Court in the winding-up. The Court may, therefore, under the first part of the section make the order now asked, directing him to pay the call. The section then proceeds to empower the Court in making such an order, when the company is not limited, to allow the contributory, by way of set-off, any moneys due to him from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit. The Legislature, therefore, has given the express power to allow a set-off in the case of an unlimited company, and by so doing it must be taken to have implied that without such express provision there would be no right of set-off, and upon the principle of the maxim *expressio unius exclusio alterius*, to have excluded, for the reason stated by the Lord Chancellor in *Grissell's Case* (1), that right in the case of the contributories of a limited company. The

19 Eq 457,

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(1) Law Rep. 1 Ch. 528. 12 Jur NS 718

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case of the *Garnett and Moseley Gold Mining Company* v. *Sutton* (1), in which a contributory of a joint stock company registered under the Act of 1856 was allowed to plead a debt from the company as a set-off against a call, solely on the ground of the express statutory right created by the 17th section of the 21 & 22 Vict. c. 60, which section was repealed and not renewed by the *Companies Act*, 1862, raises a strong inference that under the latter Act the right does not exist, and it is clear from *Grissell's Case* (2) that in the opinion of the Lord Chancellor and Lord Justice *Knight Bruce*, and probably of Lord Justice *Turner* also, the 101st section of the Act of 1862 excludes the right of set-off, except in the case of unlimited companies. Upon the ground, therefore, of the general law I am of opinion that the Respondent is not entitled to the right which he claims.

As to the second ground, if the alleged contract were proved, a nice question would arise, namely, whether a company has power to contract with one of its members to give him such a right of set-off as the Respondent claims; I am disposed to think that it has not, but it is unnecessary to decide that question in the present case, for, in my opinion, no such contract is proved. The Respondent's case rests solely on his own assertion; he relies also on certain entries in the books of the company, which are said to shew that the practice of the company in their dealings with the Respondent was consistent with the terms of the alleged contract; but these books appear to have been very loosely kept, and they are not conclusive against the company.

I must therefore order the call to be paid, with interest at the rate specified in the articles of association, but as it appears that a suit has been instituted by the official liquidator against *Calisher*, and that there are various questions pending between him and the company, I shall order the money to be placed to the separate account of "*Calisher's* call," and not to be paid out without notice to him. I shall not make *Calisher* pay the costs. The official liquidator will have his costs out of the estate.

Solicitor for the Official Liquidator: Mr. *Harper*.
Solicitors for *Calisher*: Messrs. *G. S. & H. Brandon*.

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(1) 3 B. & S. 321. 9 Jur N.S. 542

(2) Law Rep. 1 Ch. 528. 12 Jur N.S. 7

In re JOINT STOCK DISCOUNT COMPANY.

M. R.
1868
Jan. 20.

SHIPMAN'S CASE.

Company—Contributory—Transfer of Shares—Registration—Irresponsible Transferee—Unnecessary delay—Companies Act, 1862, *s.* 35.

6 Eq 241
4 Ch 770
9 Eq 595

If the articles of association of a company provide that the directors may decline to register a transfer in any case where the directors consider the transferee to be an irresponsible person, a transferor cannot claim to have his name removed from the register under s. 35 of the *Companies Act*, 1862, on the ground of unnecessary delay, unless the transferee be a responsible person.

S. sold certain shares and executed a transfer of them to *F.* The transfer was deposited for registration with the company but was not registered. Six weeks afterwards the company was ordered to be wound up. *F.* proved to be an irresponsible person:—

Held, that *S.* must be placed on the list of contributories, although it would have been otherwise if *F.* had been responsible.

ON the 29th of January, 1866, Mr. *Shipman*, being the registered owner of 250 shares in the *Joint Stock Discount Company, Limited*, sold them on the *Stock Exchange* to one *Alice Fell*, through *Augustus Frederick Clark*, her broker; and on the 30th of January he executed a transfer to her.

On the 31st of January a call of £5 per share was made.

On the 1st of February the transfer was handed to *Clark*, who gave a cheque for the amount of the purchase-money and the call; and on the same day *Shipman* paid the call to the company. On the following day the transfer, which had been duly executed by *Alice Fell*, was deposited at the company's office for registration.

The 10th of the articles of association was as follows:—

"The company may decline to register any transfer of shares made by any member who is indebted to them for any money then due, or who may be solely or jointly liable to them for any call or interest thereon, or in respect of any bill, note, security or advance, notwithstanding the same may not be then due, or in any case where the directors consider the transferee to be an irresponsible person, or that the transfer is made for purposes not conducive to the interests of the company."

According to the ordinary practice of the company (see *Shep-*

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herd's Case (1); *Nation's Case* (2)), all transfers were examined by one of the directors within a week or ten days after they had been left at the office; and if approved of by him were confirmed at the next board meeting.

Board meetings were held on the 9th, 16th and 23rd of February. On the 27th of February *Shipman's* transfer was, for the first time, examined by a director, who made a memorandum thereon that inquiry should be made as to the responsibility of *Alice Fell*, inasmuch as her name was not given in the directory under her alleged address. On the 1st of March another board meeting was held, but nothing was done as to the transfer. On the 3rd of March the directors passed a resolution that no transfers then in the office should be registered without the express sanction of the board. On the 5th of March it was resolved that a Petition should be presented for winding up the company. On the 7th of March the Petition was presented; and on the 17th the winding-up order was made. On the 1st of May *Shipman* learnt, for the first time, that the transfer had not been registered.

It was admitted that *Alice Fell* was an irresponsible person; and that *Clark* had in reality purchased the shares on his own account.

Shipman, having been placed on the list of contributories, now applied that his name might be removed from the register of shareholders and the list of contributories, and the name of *Alice Fell* or *Clark* substituted.

Mr. *Little*, Q.C., and Mr. *Swanston*, for *Shipman*:—

The company have been guilty of unnecessary delay in removing *Shipman's* name from the register. The 10th clause of the articles enables the company to object to the registration of an irresponsible transferee: but the objection must be made within a reasonable time. The ordinary practice of the company shews what was considered to be a reasonable time. According to that practice the objection ought to have been taken before the 9th of February, or at the latest, before the 16th. Nothing was done until the 27th; and by this delay the company must be taken to have waived the objection. Under the 35th section of the *Companies Act*, 1862,

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(1) Law Rep. 2 Ch. 16.

(2) Law Rep. 3 Eq. 77.

12 Jur NS 897

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Mr. *Shipman* is entitled to have his name removed from the register of shareholders and from the list of contributories; and either the name of *Clark* or *Alice Fell* substituted: *Shepherd's Case* (1); *Nation's Case* (2). It may be contended on the part of *Clark* that he is only the *cestui que trust* of *Alice Fell*, and that his name cannot be put on the list, as was held in *Ex parte Bugg* (3). But it is admitted that *Clark* was the true purchaser, and he is liable as such to satisfy the calls. It would be a complete abuse of the principle on which the Court acted in *Ex parte Bugg* to hold that *Clark's* name could not be placed on the register. Besides, in that case there was no contract entered into by *Bugg;* the only contract being with his trustees; here, on the contrary, the contract was made with *Clark*, and the rights of the parties cannot be altered by his putting forward an objectionable nominee.

Mr. *Baggallay*, Q.C., and Mr. *Bristowe*, for *Clark*; and

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the official liquidator, were not called upon.

LORD ROMILLY, M.R.:—

The cases which have been cited really have no application to the case before me. What I held in *Nation's Case*, and in all the other cases, with respect to unnecessary delay, and the duty of the company to act speedily, is this, that the company is bound to perform its own duty, and it being in those cases admitted that there was no objection to the transferee, the company was bound to have allowed the transfer into the name of the transferee within a reasonable time after the transfer was lodged with the company. There having been a meeting of the directors at which they ought to have and might have registered it, they must be held to have done so, and to have introduced that name on the list. But in all those cases the transferee was a fit and proper person to be on the list; but here it is admitted that *Alice Fell* was not a fit and proper person, and that if the directors had done their duty, they would have objected to make the transfer to her, because she was not a fit person to be upon the list. It

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(1) Law Rep. 2 Ch. 16. 12 Jur NS 897 (2) Law Rep. 3 Eq. 77.
(3) 2 Dr. & Sm. 452. 11 Jur NS 616

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is always a condition precedent in these cases that there is no objection to the proposed transferee. Here there is an objection to the transferee—nay, it goes further than that, for the objection was taken by the director, who pointed out that it was a very doubtful thing whether *Alice Fell* was a fit and proper person to be transferee of these shares, and he called on the directors to consider whether they would make the transfer to her or not. The directors did not inquire into the matter, because, on the 3rd of March, they passed a resolution which superseded any transfer at all. Mr. *Little* argued that the company must be assumed to have waived the objection if they do not take it within a reasonable time. I do not know any decision which goes to that effect. It is certain that if they do not make the transfer within a reasonable time the transferor may call upon them either to make it or to say why they do not make it. But can they not at any time, if they have a reasonable objection, bring it forward? Let us assume that this company had not been wound up, could not the directors have said, subsequently to the 3rd of March, " we do not think *Alice Fell* is a fit person to be a transferee of these shares, we object to making that transfer;" and could *Shipman* have made any objection to their doing so? I think not. It is, therefore, a condition precedent in all these cases, when you are speaking of reasonable time, that there was no real objection to the transferee. What I have held in all these cases is, that the company must be assumed to have done its duty; and in *Nation's Case* (1), assuming the company had done its duty, the transfer would have been made to him on the 1st of March. In this case, assuming the company had done its duty, the transfer to *Alice Fell* would have been refused on the 1st of March, the consequence of which is that it is impossible as against the company to say that *Alice Fell* could be the transferee of these shares. It is hard against the transferor who sells on the *Stock Exchange* not to have a fit person put on as the person to whom the shares are to be transferred. That is one of the evils which are inseparable from transactions of this description, and for which this 35th clause was passed enabling the transferor to call on the company within a reasonable time to say whether they would make the transfer or not.

(1) Law Rep. 3 Eq. 77.

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Then as to putting *Clark* on the list, that is out of the question, because there has been no transfer executed to him. *Shipman* never sold to him; he sold to *Alice Fell.* *Clark* admits that in reality the purchase was on his account, and it may well be that in another proceeding *Clark* may be held liable to indemnify *Shipman* against the consequences of having put forward a name which would not allow the transfer to be made; for if he had put forward a *bonâ fide* name the transfer would have been made on the 1st of March. But I cannot alter the register, and therefore I dismiss the summons with costs.

Solicitors for *Shipman:* Messrs. *Reed, Phelps, & Sidgwick,* agents for Messrs. *Sale, Shipman, Seddon, & Sale, Manchester.*

Solicitors for *Clark:* Messrs. *Stibbard & Beck.*

Solicitors for the Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

In re SMITH, KNIGHT, & CO.
Ex parte ASHBURY.

M. R.
1868
Feb. 10, 11, 14

Company—Winding-up after Creditors' Deed—Division of Assets—Dividend under Deed prior to Winding-up—Companies Act, 1862, *ss.* 133, 164.

9 Eq 704
15 Eq 127

Under s. 133 of the *Companies Act,* 1862, the assets of a company which is being wound up must be applied in satisfaction *pari passu* of the liabilities of the company as they exist at the commencement of the winding-up.

Where, therefore, prior to the winding-up, a dividend had been paid under an inspectorship deed to some creditors of the company, but not to others:—

Held, that there being no question of fraudulent preference, those who had not received any dividend were not entitled to a dividend under the winding-up in priority to those who had.

MR. *ASHBURY* was the holder of debentures of *Smith, Knight, & Co., Limited,* to the amount of £25,000. These debentures were issued in 1864: and the sums due on them were to be repaid in September, 1867, April, 1868, and September, 1868.

In November, 1865, the company executed a deed of arrangement with its creditors, whereby the company covenanted with certain trustees to sell and convert into money all its estate and effects, and to pay the moneys arising by such sale and conversion into a bank, in the names of the trustees, who were thereout to pay dividends on the debts due from the company to all persons who were creditors of the company, or would, at the date of the deed, be entitled to prove against the company in a winding up thereof.

Under this deed part of the company's property was sold, and out of the proceeds a dividend of 2*s.* in the pound paid to certain creditors of the company, but not to Mr. *Ashbury*, who, under sect. 158 of the *Companies Act*, 1862, would have been entitled in a winding-up to prove against the company in respect of his debentures.

In November, 1866, resolutions were passed for a voluntary winding up of the company, and this was afterwards ordered to be continued under the supervision of the Court.

Mr. *Ashbury*, who had no notice of the deed until after the commencement of the winding-up, now applied that a dividend of 2*s.* in the pound might be paid to him before any dividend was paid to those creditors in respect of whose debts a dividend of that amount had been paid prior to the winding-up.

Sir *Roundell Palmer*, Q.C., and Mr. *Swanston*, for Mr. *Ashbury* :—

Under this deed certain creditors have received a dividend of 2*s.* in the pound out of assets which, but for that payment, would be available in the winding-up. If that dividend was paid by way of preference it was a bad payment, and ought to be recalled under sect. 164 of the *Companies Act*, 1862. If it was not so paid, then Mr. *Ashbury* is entitled to come in and take the benefit of the deed.

Mr. *Jessel*, Q.C., and Mr. *Westlake*, for the official liquidator :—

If fraudulent payments have been made to creditors, then these must be recovered by a proceeding directed against the creditors themselves, not against the official liquidator.

If the payments are not fraudulent, how can any such order as is sought be made? If the deed clothes the assets of the company with a trust in favour of creditors, then it is an assignment by the company of all its estate and effects for the benefit of its creditors, and void under sect. 164 of the *Companies Act*, 1862. If the deed does not create any such trust, but rests in covenant only, then by sect. 133 it is the duty of the liquidator to apply the assets in satisfaction of the liabilities of the company *pari passu*: that is, of the liabilities as they exist at the commencement of the winding-up.

Sir *Roundell Palmer*, in reply:—

I do not contend that the deed creates a trust of the whole assets. But under sect. 133 the Court can make such an order as will satisfy the justice of the case. The assets are to be applied in satisfaction of the debts *pari passu*. That will be done if the payment already made be considered to have been made on account. The deed, in fact, anticipated the winding-up; and, although there would be an apparent inequality in the order now sought for, in truth a real inequality would be prevented.

Feb. 14. LORD ROMILLY, M.R.:—

In this case, though I have endeavoured, if I could, to accomplish the task which Mr. *Ashbury* imposed upon the Court, yet I do not see any way of complying with his application. It is unquestionably a case of some injustice, but I do not see how the Court has any authority to set it right.

The state of the case is shortly this:—a company is in difficulties, it executes a deed of inspectorship, and under that pays a certain class of creditors 2*s*. in the pound, perfectly *bonâ fide*, and not at all by way of any fraudulent preference. After that the company is wound up, and then the assets are got in, and a class of creditors who have received nothing come and ask to be paid 2*s*. in the pound before any remaining assets are divided in payment of dividends. There is nothing in the Act of Parliament to justify that. What sect. 164 points to is very plain; it points to putting an end to a fraudulent preference, and it also puts an end to an assignment in favour of creditors. It says that any assignment in favour of creditors by a company shall be absolutely and *ipso facto* void. This is not an assignment in favour of creditors, and, therefore, it is not void; and if it were, this would not be the mode of applying to obtain back again from the persons who have been

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overpaid the amount which they have received. If a creditor has received a dividend which he ought not to have received, that is a question in which there is no representation; it is an individual case against each creditor, and, therefore, it would be necessary in this case, if anything could be made of it, to go against each creditor to have his sum of money returned. The Act of Parliament unquestionably says, that everybody shall be paid *pari passu,* but that means everybody after the winding-up has commenced. It does not mean that the Court shall look into past transactions, and equalise all the creditors by making good to those who have not received anything a sum of money equal to that which other creditors have received. It takes them exactly as it finds them, and divides the assets amongst the creditors, paying them their dividend on their debts as they then exist. If anything has been paid beforehand that must be deducted from the amount of the proof. It is, therefore, impossible for the Court to accede to this application.

Solicitor for Mr. *Ashbury:* Mr. *H. Skynner.*

Solicitors for the Official Liquidator: Messrs. *Ashurst, Morris, & Co.*

PENNY *v.* PENNY.

V.-C. W.
1867
Nov. 23;
Dec. 21.
1868
Feb. 8.

Metropolis Improvement Act—Lands Clauses Consolidation Act—Notice to treat—Tenant for Life and Reversioner in a Term of Years—Determination of Life Tenancy on ceasing to carry on Business on the Premises—Principle of Estimation of Value—Jury.

A testator died in 1862, having bequeathed the residue of a term of years of which he was possessed, under a lease, in a house where he and his two sons carried on business, to his executors, upon trust to permit and suffer his sons "to hold, use, occupy, and enjoy," the leasehold premises "so long as they may carry on the business together therein, as now carried on by me and them in partnership together," they paying a low rent to the executors, and the executors paying the rent reserved by the lease. He further declared that if his sons, or one of them, should at any time "decline" to carry on the business on the premises, his executors were to sell the same, with power to lease until sale. By an order of the Court the leasehold premises were directed to be sold whenever the sons, or the survivor, should "decline or cease to carry on business" on the premises. On the 8th of May, 1866, the Metropolitan Board of Works gave notice to treat for the premises, and by an order, made on a Petition presented by the executor, he was ordered to submit his claim to a jury, which he did, and obtained a verdict for £8222, which was stated to have been given on the footing of his being entitled to the whole residue of the term, subsequent to the 8th of May, 1866. The sons submitted their claim to arbitration, and had been awarded £4070. The Board of Works objecting to pay both sums:—

Held, that the valuation of the executor's interest ought to be made as of the interest which, at the moment when the premises were taken, he would have had if they had not been taken;

Hence, that in order to arrive at such value, a deduction must be made from the whole value of the premises in respect of the contingency that the executor might have been compelled by the continuance of the sons' occupation to take a depreciated rent:

Held, further, that the balance after such deduction must be estimated by a jury, summoned in the usual way under the Act:

Held, also, that the sons were entitled to a sum equal to the present value of the improved rent of the premises, beyond the rent and outgoings payable by them for the residue of the term, during their lives and the life of the survivor, subject to a deduction in respect of the chance that they would have discontinued to carry on business.

THIS was a Petition.

Charles Penny, stationer, by his will, dated the 5th of August, 1859, bequeathed to his executors all his leasehold premises situate in *St. Mary Aldermary Churchyard*, upon the following trusts:—"Upon trust to permit and suffer my son, *Charles Penny*, and my son *John Penny*, to hold, use, occupy, and enjoy the said leasehold premises, so long as they may carry on the business together therein as now carried on by me and them in partnership together;" they paying to his executors, in respect of the premises, the clear yearly rent of £400 by quarterly payments; and also paying all rates, taxes, and assessments whatsoever in respect of the said premises, and keeping the same insured and in good and substantial repair during their tenure thereof: "but," he added, "the rents payable under the leases by which I hold the same are to be paid by my executors out of the residue of my personal estate." Testator further declared that if only one of his said sons should carry on the business as aforesaid, that clause should be applicable to him in like manner as if the name of such one son had been therein inserted. Testator then made a specific devise of real estate, and then a residuary devise of realty upon trusts for sale, and made a bequest (under the articles) of his capital share in the partnership business, consisting of £26,423 15*s.* 5*d.*, giving £3000, part thereof, to his said partners, *Charles* and *John Penny*, and directing the residue to sink into his general residue. He then bequeathed his general residue, including the produce of his real estates, the balance of the above capital share in the partnership business, with all increase and accumulations of his share in the said capital, policies of insurance, and money in the funds, "and the said leasehold premises and furniture (subject as hereinbefore and hereinafter expressed)" to his three sons, *Charles Penny*, *Frederick Penny*, and *Alfred Penny*, their executors, administrators, and assigns, upon the trusts therein declared, which were shortly as follow: one-fifth for the benefit of testator's daughter, Mrs. *Row*, and her children; another fifth for the benefit of another daughter, Mrs. *Hay*, and her family; a third for *Frederick Penny*; a fourth for *Alfred Penny*; and the remaining fifth for the benefit of testator's grandchildren, issue of his daughter, Mrs. *Brice*.

The will then contained the following clause: "Provided always, and I do hereby declare, that in case my said sons, *Charles Penny* and *John Penny*, or one of them, as the case may be, shall at any time decline to carry on the business as now carried on by me and them in partnership together, on my said leasehold premises in *St. Mary Aldermary Churchyard*, then it shall be lawful to and for the trustees or trustee for the time being of this my will (if in their or his discretion they or he shall think fit so to do) to sell and absolutely dispose of" the said leasehold premises; "and also that until such sale as aforesaid it shall be lawful for the trustees or trustee for the time being of this my will to demise, lease, or grant all or any part of my said leasehold premises, for such term or terms of years, and together or in parcels, and at and subject to such rents and covenants, as they or he shall in their or his discretion think proper." Testator appointed *Frederick* and *Alfred Penny* his executors, and died on the 31st of March, 1862.

At the date of his will, and at his death, the house and premises in *St. Mary Aldermary Churchyard* were held by him under a lease from the churchwardens and overseers of the parish, from Lady Day, 1855, for the term of thirty-one years, at the rent of £150 per annum.

In August, 1863, *Frederick Penny*, the sole surviving executor under the testator's will, filed this bill against *Charles, John*, and *Alfred Penny*, to have the trusts of the will performed. Inquiries were directed, and a certificate made; and by an order on further consideration on the 8th of June, 1865, it was, amongst other things, ordered that the leasehold premises in *St. Mary Aldermary Churchyard* be sold with the approbation of the Judge, "whenever the said Defendants [*Charles* and *John*] or the survivor of them, shall decline or cease to carry on business on those premises," the money to arise from such sale to be paid into the bank to the credit of the cause.

In May, 1866, a notice to treat for the premises, dated the 8th of May, was served on *Frederick Penny*, the Plaintiff, by the Metropolitan Board of Works, and on the 21st of May his solicitors delivered to the Board a claim, in which the property was described as "leasehold for thirty-one years at the rent of £150, in the occupation of *Charles Penny* and *John Penny*, under a provision in that behalf contained in the will of the lessee, *Charles Penny*, deceased, dated 5th of August, 1859, permitting the said *C. Penny* and *J. Penny* to occupy the same, so long as they might carry on the business together therein, on payment of a yearly rent of £400"; and the column for amount claimed was filled up thus: "£8222 claimed for the value of leasehold interest exclusive of fixtures, to be taken at a valuation." Similar notices were also served on *Charles* and *John Penny*, who were still carrying on business on the premises, and they also delivered a claim to the Board.

In December, 1866, *Frederick Penny*, the Plaintiff, presented this Petition, praying as follows:—"That directions may be given to the Petitioner how he should act, and what course he should adopt with reference to the said notice from the Metropolitan Board of Works, and, in particular, whether he should deliver to the Board any, and what, new, amended, or other claim, in respect of the said leasehold premises; and whether he should come to any and what agreement with the Board of Works in respect of the purchase-moneys and compensation to be paid for the leasehold premises, or whether he should require the amount of such purchase-moneys and compensation to be assessed by a jury or by arbitration pursuant to the provisions of the *Lands Clauses Consolidation Act*, 1845:

"That the rights and interests of all parties in the said leasehold premises, under the testator's will, and in the purchase and compensation moneys, which shall be paid by the Metropolitan Board of Works for the said leasehold premises, or such part or parts thereof as they may purchase and take pursuant to the said notice, may be declared by this honourable Court, and that the same may be applied and appropriated accordingly."

George Barnes Williams, Plaintiff's surveyor, deposed that the valuation of £8222 was made by him in April, 1866, upon the assumption that the above-named Plaintiff, as trustee of the will of *Charles Penny*, deceased, the testator in the cause, was entitled to the whole value of the unexpired term of the original lease of the premises, and that *Charles Penny* and *John Penny* ceased to have any interest, so far as the lease was concerned, from the time of the notice from the Metropolitan Board of Works.

The Defendant, *Charles Penny*, deposed that on the 4th of April, 1866, he was served with the notice to treat, and he and his brother *John* thereupon instructed *Richard Tress*, a surveyor, to value their beneficial interest in the premises.

Richard Tress deposed he had no difficulty in valuing the interest of *Charles* and *John Penny.* It might be done in either of two ways: either by fixing the present annual rental value, deducting the rent fixed by the will to be paid by the two Defendants, and multiplying the difference by the number of years' purchase which would represent the present value of the unexpired term, or of the life of the survivor of the two Defendants, deducting from the product a small percentage to represent the contingency of the two Defendants, otherwise than by death, ceasing to carry on business: or by fixing the rent which, in the present state of the money market, must be paid to obtain similar premises in an equally good situation and of equal value, deducting from that the actual rent which the Defendants had to pay, and multiplying the difference by the number of years' purchase as before, and deducting, as before, a small percentage. Deponent said he should value the Plaintiff's interest in this way: he would take the rent fixed by the will to be paid by the two Defendants, deduct from it the rent paid by the Plaintiff to the ground landlord, multiply the difference by the number of years' purchase, which would represent the present value of the unexpired term, and add a percentage to represent the value of the contingencies which might happen to the occupation. He thought there would be no difficulty in dealing with either interest separately before a compensation jury or arbitrators.

Upon this evidence the Petition came on, on the 10th of December, 1866, when the Vice-Chancellor made a simple order that if the Board should not accept the terms proposed by the executor, he was to submit his claim to a jury under the *Lands Clauses Act;* the rest of the Petition to stand over.

The Plaintiff, on the 4th of January, 1867, sent in his notice requiring a jury, and the warrant to the sheriffs issued on the 21st. On the 5th of May a special jury was summoned, and a verdict was returned for £8222 for the leasehold interest, and for £78 for fixtures, and, the following note was entered by the Common Serjeant, who presided at the hearing, on his notes: "This sum (£8222) is assessed as the value of the residue of the term now vested in the executor, assuming a rack rent, and taking no notice of the interest, whatever it may be, of the tenants under the will of the testator. If any deduction from this sum is to be made for the value of such interest, it is to be made in the administration suit by the Court of Chancery." On the part of the Board of Works it was alleged that this note was entered by consent, but the Plaintiff's solicitor stated that it was made "at the instance of the Board, and formed no part of the verdict."

On the 6th of December, 1866, the Defendants, *Charles* and *John Penny*, sent in a notice, stating the particulars of the bequest to them, and an agreement, dated the 30th of September, 1862, whereby they had agreed to let the first and upper floors of one house, and the second and third floors of the other, to a Mrs. *Plane* for three years from the 29th of September, 1862, at the rent of £132 10*s*., and finally claimed £14,000 for purchase-money and compensation. On the 17th of December, 1866, arbitrators were appointed, and on the 26th of April, 1867, the umpire made his award, and found the two Defendants' interest in the leasehold to be £4070, and awarded £3041 for trade compensation.

On the 11th of March, 1867, the Plaintiff's solicitors sent in an abstract of his title. A correspondence ensued between the Board and the Plaintiff's solicitors, in the course of which the latter refused to submit to any deduction on the footing of the umpire's valuation.

Next followed a correspondence between the Board and Messrs. *C. & J. Penny's* solicitors. The latter said that their clients' interest was in no way in issue in the suit, and the sum awarded in respect of that was wholly irrespective of the compensation awarded by the jury. They delivered their abstract on the 13th of June, 1867.

After further correspondence, the Board, on the 27th of July, 1867, obtained an order for payment into Court, to the credit of the cause, of the sum of £8470 0*s*. 9*d*., being £8222, the sum assessed by the jury, and interest.

On the 8th of July, *Charles* and *John Penny* commenced an action against the Board to recover the £4070, to which the Board pleaded payment, under the 76th section of the *Lands Clauses Act*, and a verdict was taken for the Plaintiffs in the action at the *Surrey* Assizes, subject to a special case, not yet heard. The Board paid the £3041 for trade compensation into Court in the action.

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Upon this further evidence the Petition again came on, on the 21st of December last.

Mr. *Willcock*, Q.C., and Mr. *L. Field*, for the Plaintiff (the Petitioner):—

We claim the fund in Court, as being the value of the lease for the rest of the unexpired term. From the moment the property was taken by the company, there was an end of all possibility of the Defendants occupying the house and carrying on business.

In *Appleby* v. *Meyers* (1), Plaintiffs, engineers who had contracted to erect and had partially erected, works on the Defendant's premises, upon a fire taking place, were held not entitled to recover the whole of the contract price.

Here there were many causes which might have put an end to the carrying on of business—bankruptcy, lunacy, or even severe illness; and, among others, the possibility of the land being taken under statutory powers. The testator could not foresee what might have happened.

[Reference was made to *Brandon* v. *Brandon* (2), and to *Ex parte Cooper* (3).]

Mr. *Hardy*, Q.C., for *Alfred Penny*, and for Mrs. *Row* and Mrs. *Hay*, who had obtained leave to attend the proceedings:—

The construction of the clause is to give a benefit to *Charles* and *John Penny* only so long as they should carry on business. Directly they ceased, from any cause, to do so their interest ceased also.

Mr. *F. Harrison*, for the infants *Brice*, and

Mr. *Martelli*, for Mrs. *Plane*, who had similarly obtained leave.

Mr. *G. M. Giffard*, Q.C., and Mr. *C. Hall*, for the Board of Works:—

It cannot be that we have to pay both these amounts. The Plaintiff and the two Defendants cannot take more between them than the full value of the residue of the unexpired term.

(1) Law Rep. 1 C. P. 615. 12 Jur NS 500 (2) 2 Dr. & Sm. 305: 11 Jur NS 30
(3) 2 Dr. & Sm. 312. 11 Jur NS 105

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If the former gets more, the latter must submit to a deduction; otherwise we should have to pay the difference occasioned by these contingencies twice over.

Mr. *Everitt*, for the Defendants, *Charles* and *John Penny*:—

It is we, not the Plaintiff, who are entitled to the residue of the term for our lives and the life of the survivor, subject, if necessary, to deduction.

We are to "hold, use, occupy, and enjoy" the premises "so long as we may carry on business together therein." We did not cease to reside of our own act. Our ceasing to reside was a necessary consequence of the act of the Board of Works; and it cannot be that the act of a stranger is to determine our interest, and actually to increase the value of the interest given by the will to the Plaintiff. At all events, if the Board have to pay the Plaintiff the increase in value which their own act has occasioned, the amount to which we are entitled is not lessened. What we are entitled to is the value of what we sell; we have nothing to do with what the company buy from others.

Appleby v. *Meyers* (1) was the case of a contract; the parties had chosen to contract in a particular way; and the true test would be not a fire, but the act of a railway company taking the property before it was finished.

If our interest be limited to the time during which we carry on business, it becomes an equitable interest for lives and the surviving life, determinable only on our ceasing to carry on business, which might have been not until the natural end, had it not been for the Board of Works. If so, we ought to receive the full value from them, because they have put an end to our equitable interest: *Sweetman* v. *Metropolitan Railway Company* (2). If we are not entitled to the whole, the deduction is a question for valuation.

We are not bound to occupy personally, so long as we carry on business: *Rabbeth* v. *Squire* (3). That disposes of some of the contingencies that have been referred to.

Mr. *Willcock*, in reply.

(1) Law Rep. 1 C. P. 615. 12 Jur NS 500 (2) 1 H. & M. 543.

(3) 19 Beav. 70; 4 De G. & J. 406. 1 Jur NS 218

SIR W. PAGE WOOD, V.C.:—

I think the general principle upon which this case must be decided is very clear, although a certain embarrassment has arisen by reason of two valuations having been made by different tribunals.

When a claim is served upon a person whose property is about to be affected by a public body requiring the property for public purposes, the Act of Parliament simply prescribes that the person shall send in a statement of his interest.

The claim of the two Defendants in this instance appears to have been stated fairly enough. The exact nature of their interest was described, and that being so, the duty of those who would have to value the Plaintiff's interest would be to do so as they best could, using for that purpose the assistance of counsel, and of the presiding Judge. Several grounds would be set forth which I cannot enter into here; but I think the valuation ought to be made as at the time when the house was about to be taken, and should be made of the exact interest which the Plaintiff would at that moment have had, assuming that the house had not been taken.

I can conceive an Act of Parliament giving to a public body, like this Metropolitan Improvement Board, an express power to buy an interest of this sort. The Board would, in effect, say to the Plaintiff: "We will buy your interest in order to make certain improvements. You have a reversion in this leasehold, subject to this inconvenient clause about habitation. The life estate is liable to be cut short, but so long as the house remains inhabited, you, the reversioner, must submit to a deduction (which is matter for a jury) because you are not entitled to the whole beneficial rent; but, on the other hand, you have chances of the interest terminating earlier, which chances you will submit to the jury. There are chances of the Defendants' business ceasing from bankruptcy, lunacy, or the like. Such difficulties as these are knots which a jury must untie."

As to the value of the interest, it appears to me clear that the Plaintiff's interest is not to be treated as having been increased through an act of the Board of Works. One might as well value the interest of the improvements which have taken place in consequence of the houses having been thrown down, and other constructions made, and so on. It is not the interest which has been acquired by the Board that has to be estimated, but the value of the interest taken from the person with whom the Board deals.

On the other hand, the Defendants would go to the jury and say: "We have this property, and if this public body had not come and taken our property for improvements, we might have gone on with our trade, and we should have done so, because there was nothing to prevent us."

The Plaintiff would have an opportunity of saying to the jury in reply: "But your interest is not an estate for life; it is liable to be determined by a variety of incidents, and so far, therefore, its value is to be depreciated." As I said before, the jury must cut the knot.

But it does not follow that because the taking of this property determines the Defendants' interest, therefore the reversioner has a right to say that the Board must pay twice over for the same property. For that is what the argument comes to, when it is contended that the Board must not only pay those who had got the lease at a low rent, and who were entitled to hold it during their lives and the life of the survivor, so long as they should carry on the business, but that they must pay the reversioner more, in consequence of their having enriched the reversion by destroying the business—in other words, for having handed over the benefit of their acts to the reversioner.

That is not at all the scheme of the Act. The scheme of the Act I take to be this: that every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given. Any difference in the result which is due to the accident of the property being taken by a public body is not to be thrown into the compensation fund. There are to be calculated what, on the one hand, are the chances of the Plaintiff continuing to have to submit to a depreciated rent, in consequence of the business being carried on by the Defendants; and what, on the other hand, is the separate and independent interest of the Defendants. In the one case there should be a deduction, in the other a valuation. So far the principle is clear.

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But in this particular instance I confess I cannot see my way towards putting the two results that have been arrived at together, because the Plaintiff's valuation was made by the jury in the absence of these Defendants. The only way of doing justice is by having a second valuation made, and this Plaintiff, who claims the whole, must go to a jury to determine the amount of the reduction to which he must submit. The Defendants, meanwhile, will be left in possession of the award which they have already got.

Feb. 8, 1868. The following is a minute of the order made this day:—

Declare that the Plaintiff, as executor, is entitled to the leasehold premises, subject to the interest of the Defendants, *C.* and *J. Penny;* declare that the testator's sons, *C.* and *J. Penny*, and the survivor, are and is entitled to hold, use, occupy, and enjoy the said leasehold premises, so long as they or either of them, or the survivor, but for the taking of the same premises by the Metropolitan Board of Works, might have carried on the business therein, they, or one of them, paying to the Plaintiff, as executor, the yearly rent of £400, and also paying all rates, taxes, and assessments whatsoever, in respect of the said premises, and keeping the same insured and in good and substantial repair, and order that the Plaintiff, as such executor, deliver to the Metropolitan Board of Works a fresh claim in respect of his interest in the said premises as hereby declared, and in case the said Metropolitan Board of Works do not accept the terms proposed by such claim, the amount of the compensation to be paid to the Plaintiff to be ascertained by a jury, in the manner provided by the *Lands Clauses Consolidation Act*, 1845, without prejudice to any question how the costs of such inquiry shall ultimately be borne; and order that the costs of the Plaintiff and the Defendants, and of all other persons appearing upon the said Petition, other than the Metropolitan Board of Works, other than such costs as, by any order of this Court, or by virtue of the said *Lands Clauses Act*, 1845, are, or ought to be, paid by the Metropolitan Board of Works, be costs in the cause; further hearing adjourned.

Solicitors for the Plaintiff and some Defendants: Messrs. *Weir & Robins.*

Solicitors for the Defendants *Charles* and *John Penny:* Messrs. *Lott & Rogers.*

Solicitors for other Defendants: Messrs. *Harrison, Beal, & Harrison.*

Solicitor for the Board of Works: Mr. *W. W. Smith.*

V.-C. W.
1868
Jan. 20.

In re EZEKIEL BARTON'S TRUST.

Tenant for Life and Remainderman—Income or Capital—Bonus—Dividend—Capitalizing Profits.

2 M R 14 r W
6 Ch 508
12 Eq 594-5
18 Eq 700

Shares in a company were settled upon trust to pay *A.* during her life "the interest, dividends, share of profits, or annual proceeds," and after her death in trust for her children.

The deed of settlement of the company provided that, by the vote of the majority, out of the half-yearly profits a dividend might be declared, and a sum reserved for such contingencies as the directors should specify.

During *A.'s* lifetime an addition of three new fully paid-up shares to those already held in trust for her was made, pursuant to a resolution passed at a general meeting of the company to apply a portion of "the net earnings during the half-year" to necessary works, and issue new shares to represent the money so applied, a dividend being declared out of the remaining portion of the earnings:—

Held, that these new shares were capital, and not income, as between the tenant for life and those entitled in remainder.

EZEKIEL BARTON, by deed-poll, dated the 23rd of March, 1850, after reciting that, being desirous of making a provision for certain members of his family, he had lately transferred five fully paid-up shares of Rs.1000 each belonging to him in the *India General Steam Navigation Company* into the names of two trustees, thereby declared the trusts, which, so far as is material, were:—during the life of *Annatilda Juliet Jones*, granddaughter of *Ezekiel Barton*, to pay her the "interest, dividends, share of profits, or annual proceeds of the said shares until sold, and of other the stocks, funds, and securities whereon the proceeds of such shares when sold should be held," for her separate use, without power of anticipation; and after her decease upon trust for all and every the child or children of the said *Annatilda Juliet Jones* by her then present or any future husband, or the issue to be born in the lifetime of the said *Annatilda Juliet Jones* of any such child or children, as she should by deed or will, notwithstanding coverture, appoint; and in default of appointment in trust for all and every her children who should survive her, and being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares as tenants in common.

Mrs. *Jones*, whose first husband died on the 6th of September, 1852, was, on the 29th of September, 1852, married to *Joseph Haythorne Latcham*, and died on the 9th of December, 1861.

At the date of her death, in addition to the five shares standing in the names of the trustees, three fully paid-up new shares, and six tenth parts of another paid-up new share, had been placed and were standing in their names.

The *India General Steam Navigation Company* was originally established in *India* in 1844, under a deed of settlement, as an ordinary joint stock partnership, for the purpose of navigating steam vessels on the *Ganges* and other rivers of *India*. The deed of settlement provided that the capital stock of the company should consist at first of twenty lacs of rupees, or £200,000, divided into 2000 shares of Rs.1000, or £100, each, and that as soon as 1000 shares should be subscribed for, and the deposit paid, the directors should begin business, and also that, with the consent of a special general meeting, and after advertisements in *India* and *London*, the capital might be increased above twenty lacs, the additional capital to be divided into shares of Rs.1000 each.

Article XXXIX. was as follows:—"At the half-yearly meetings, to be held in January and July, the directors shall report in writing the true state of the affairs of the company, and shall also present a just and true statement of all the receipts and disbursements of the half-year next preceding, and a proper mercantile balance-sheet of the debts and credits, assets and effects of the said company, and the amount of profit accruing to the said company upon the account so rendered; and the said directors shall also report and state their opinion whether any part, and what part, of the said profits should be reserved to meet wear and tear or any other specified contingencies, and what dividend they would recommend to be paid to the shareholders out of the said profit, and at each half-yearly meeting a dividend may be declared out of the said profit, and a sum reserved for such specified contingencies, by the major part of the shareholders entitled to vote at such meeting."

In the first instance the company issued only 1073 shares, which were fully paid up. The five shares settled by *Ezekiel Barton* were five of these, and at some time before June, 1858, one additional share had been added under circumstances similar to those hereinafter stated, and the capital had been increased to thirteen lacs.

At a general meeting of the company, held at *Calcutta* on the 13th of September, 1858, a further issue of capital from thirteen to twenty lacs was proposed in the report of the directors, which also mentioned that, in anticipation of the capital required being subscribed, two new cargo flats and two new steamers had been ordered. Resolutions were passed authorizing the directors to take the necessary steps for increasing the capital from thirteen to twenty lacs.

On the 24th of September, 1858, the company was duly registered as a company with limited liability, under the *Indian Limited Liability Act* of 1857 (similar in provisions to the *Joint Stock Companies Act*, 1857), and the deed of settlement continued after such registration to constitute and embody the regulations by which the company was governed.

At the half-yearly general meeting, held on the 14th of March, 1859, the report of the directors, which was adopted, after stating that the net earnings of the steamers and flats during the half-year ending the 31st of December, 1858, were Rs.1,033,947 12*a.* 7*p.*, proceeded as follows:—

> "From this sum we have applied Rs.360,000 towards the cost of the two new steamers and flats ordered from *England*, and with reference to the resolution passed on the 13th of September last, that the directors be authorized to take the necessary steps for increasing the capital of the company, we recommend that, to represent the money so applied, 260 new shares of Rs.1000 each be issued free of charge to shareholders (say, in the proportion of one-fifth of a share to the holder of every one of the 1300 shares representing the present capital of the company); and we further recommend that a dividend of Rs.500 per share be declared and paid in cash, leaving the balance, after payment of the directors' commission, to be passed to the credit of wear and tear account."

The report, after giving the cost of the four new vessels, and the sum required to complete them, announced that at the next half-yearly meeting a further issue of shares would be proposed to represent their cost in excess of the Rs.260,000 already provided.

In accordance with this report, certificates for 260 new shares of Rs.1000 each were issued free of charge to the shareholders in the company in the proportion of one-fifth of a share to the holder of every one of the 1300 original shares in the company, and one such new paid-up share of Rs.1000, and one-fifth of another new share, were thus allotted soon after the month of March, 1859, to the trustees of the settlement.

The subscribed capital of the company was by these means increased from Rs.1,300,000, or £130,000, to Rs.1,560,000, or £156,000, and articles of association abrogating the deed of settlement were soon afterwards prepared, and were, by special resolution of the 12th of March and 23rd of May, 1860, adopted as the regulations of the company.

The paid-up capital of the company was therein stated as Rs.1,560,000, divided into 1560 shares of Rs.1000 each, and it was provided by Art. XXII., that "Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects, whether with reference to payment of calls, or the forfeiture of shares, or non-payment of calls, or otherwise, as if it had been part of the original capital."

Amongst other regulations contained in the schedule annexed to the *Indian Limited Liability Act*, 1857, and incorporated in the new articles of association, was the following:—

"Rule 65. The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund, to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they, with the sanction of the company, may select."

At the half-yearly meeting of the company, held in September, 1859, the report of the directors after shewing "the amount of the net earnings during the past half-year, on which there appeared to be Rs.438,477 as the net balance at the credit of the profit and loss account for the six months, and available for a dividend," proceeded to state that this would admit of a dividend at the rate of Rs.250 per share being paid, leaving a balance of Rs.48,477, less directors' commission, to be carried to the wear and tear account.

After stating the amounts (cost of new premises, proposed new dock, new coal boats, and the balance of the estimated cost of the new steamers, &c. &c) to be provided for in that half year, the directors, looking to these facts, recommended: 1. a cash dividend of Rs.150 per share; 2. that Rs.156,000 (Rs.100 per share, for which receipts should be given to each shareholder) be set apart in the same way as last half-year; 3. that a similar sum of Rs.156,000 be also appropriated in the same manner out of the profits of the half year, making together Rs.312,000, and leaving a margin on the estimate of Rs.27,000, "which should be more than ample to meet all our monetary requirements, and to complete all proposed operations." The report also recommended that at the next half-yearly meeting the receipts granted for the above-mentioned sum be called in, and in lieu thereof regular shares be allotted in the proportion of one new share to every five of the existing shares, the new shares to bear dividends from the 1st of January, 1860.

The result of these operations was, that the five shares originally standing in the names of the trustees had been increased by three new shares and six-tenths of a share.

The dividends on the original shares, and on the new shares, were paid to Mrs. *Latcham* (*Annatilda Juliet Jones*) up to the time of her death in December, 1861. Letters of administration of her personal estate were granted to Mr. *Latcham,* and the new shares were claimed by him as her legal personal representative, on the ground that they were to be considered as income accruing during her lifetime, and not as capital.

The shares had been sold by the trustees (with the consent of Mr. *Latcham,* and without prejudice to his claim), and the proceeds had been paid into Court.

The two surviving children of Mrs. *Latcham* (by her first husband) presented this Petition, praying that the interests of the Petitioners and of Mr. *Latcham*, as the personal representative of his late wife, might be ascertained and declared.

Mr. *G. M. Giffard*, Q.C., and Mr. *Haddan*, for the Petitioners, contended that the new shares, which were derived from a portion of the profits not appropriated for the purpose of dividends, formed capital, and not income, and went to the children: *Bates* v. *Mackinley* (1); *Maclaren* v. *Stainton* (2); *Clive* v. *Clive* (3), as explained by *Wright* v. *Tuckett* (4). [They also referred to *Plumbe* v. *Neild* (5).]

Mr. *Decimus Sturges*, for Mr. *Latcham*:—

We claim the new shares as income forming part of the estate of the tenant for life.

Everything that has been earned during the half year is dividend for that half year, and the fact that the directors have kept back a portion of the earnings and divided it out in stock-money does not affect the rights of the tenant for life so long as what has been dealt with is actual profit on that half year: *Plumbe* v. *Neild*; *Hollis* v. *Allan* (before Vice-Chancellor *Kindersley*, July, 1866).

The company had no power to compel the tenant for life to risk any more in the venture than the shares originally held, and could not be allowed for themselves, by declaring or withholding a dividend out of the profits, to alter the rights as between tenant for life and remainderman: *Paris* v. *Paris* (6).

Mr. *Haddan*, in reply.

SIR W. PAGE WOOD, V.C.:—

I think I must hold that the additional shares were made capital, and that I must treat them as such, and that they go in augmentation of the stock. As long as the company have the profit of the half-year in their hands, it is for them to say what they will do with it, subject, of course, to the rules and regulations of the company. One of these rules and regulations is, that out of the half-yearly profits the company may set apart for contingencies to be specified by the directors so much as they think fit, and divide out the remainder among the shareholders. It is quite true that they earned the money in the half-year, but it appears to me they were not bound by their constitution to divide it, and certainly the directors, with the assent of the whole company, might take another course if they thought fit. Instead of dividing it out as profit they may say, "It is not convenient to anybody to go into the market with fresh shares (and this I suppose was their view), and therefore we call upon you the shareholders to stay your hands and not to ask for the full amount in dividends, but to have an equivalent in shares paid over to you, so that the dividend may be reserved and carried over to the coffers of the company as capital." I apprehend it was competent to them to do that by resolution, and that they fairly might consider this as a contingency specified. The directors specified this matter of flats and steamers which they had purchased and thought necessary for carrying on the business, and they recommended that this course should be taken, viz., that instead of dividing out the half-year's profits, the shareholders should authorize them not to allow so much profit to be made in this one half-year, but have it put by as a store, just as what was put by for the wear and tear account. For what is put by for the wear and tear account will come into the next year and increase the dividends, being so much off the next year's charges. The whole company being thus minded might say it was prudent to do so.

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(1) 31 Beav. 280. 8 Jur. N.S. 299
(2) 27 Ibid. 460; 5 Jur. N.S. 360
(3) Kay, 600.
(4) 1 J. & H. 266.
(5) 6 Jur. (N. S.) 529.
(6) 10 Ves. 185.

The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account, and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain. The only mode in which a tenant for life could act would be to use his influence with his trustees as to their votes with reference to the proposed arrangement. This is the only answer that I can give to the

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18 Eq 700

observation made in the argument of *Paris* v. *Paris* (1): "Upon this argument it must depend upon the will of the bank whether the tenant for life or the remainderman shall have the benefit; for it must depend upon the form in which they make the division;" Lord *Eldon*, who felt himself bound by the decision of the House of Lords, from which he could not distinguish the case before him, noticing the difficulty and saying (2), "It is true the bank have it in their power to give the *bonus* to the tenant for life or not." If a man has his shares placed in settlement he gives his trustees, in whose names they stand, a power of voting and he must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle, and I must hold that these additional shares formed part of the capital fund under the settlement, and went to the children and not to the tenant for life (their mother).

Solicitors: Messrs. *Western & Sons*.

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1868
Jan. 18, 20.

5 LR 380

Will—Construction—Erroneous Belief on part of the Testator.

Testator, by will, dated in 1849, bequeathed the interest of a fund to *Charlotte Lee*, "but in case the said *Charlotte Lee* should marry, or die unmarried," the fund was to go over. *Charlotte Lee* was the maiden name of testator's daughter, who had been married in 1828; and it was found that the testator knew of her marriage, but that it could not be shewn under what circumstances he knew it. It also appeared that *Charlotte's* husband had in 1849 not been heard of for many years. After the testator's death the husband appeared, and on the death of *Charlotte* claimed the fund:—

Held, that the circumstances were sufficient to shew that the testator in 1849 believed his daughter's husband to be dead, and that he intended that no husband of hers should have the benefit of the fund; and, accordingly, that on her death it passed by the gift over.

JAMES LEE, late of *Stockwell*, in the county of *Surrey*, carman, by his will, dated the 18th of July, 1849, after giving various specific and pecuniary legacies, gave and bequeathed, after the death of his wife, *Jane Lee* (who died before the institution of the suit), the following legacy: "I do give and bequeath to *Charlotte Lee* the yearly interest of £1000 bank stock, free of legacy duty; but in case the said *Charlotte Lee* should marry, or die unmarried, then the said sum to be divided between *Mary Ann Lee*, the daughter of *Thomas Lee*, and her children." The will then contained a bequest of the testator's residuary personalty after the death of his wife, "to the children of *Thomas Lee*, *Henry Lee*, *Mary Lee*, and *Ann Brandon*," and the testator thereby appointed his wife, *Jane Lee*, his nephew, the Defendant *Edward Dean* (in the will called *Edward Lee*), the Plaintiff *Henry Warner*, and the Plaintiff *Thomas Lloyd Crosthwaite*, his executors.

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(1) 10 Ves. 188.

(2) 10 Ves. 190.

The testator died on the 23rd day of December, 1850; and his will was proved by all the executors except *Edward Dean* (otherwise *Lee*), who never took any part in the testator's affairs.

The bill was filed on the 24th of July, 1856, by *T. L. Crosthwaite* and *H. Warner*, the surviving executors and trustees, for administration, and inquiries were directed, the result of which was that the Chief Clerk, on the 6th of July, 1867, certified (amongst other things) that the person meant by the description of *Charlotte Lee* was *Charlotte* the wife of *John Antrim*, that she was married at the date of the testator's will; and that such marriage was known to the testator from the time of such marriage on the 21st day of April, 1828, but that it was not shewn under what circumstances he knew it; also that she had been living separate from, and had not seen or heard of her husband for many years before the date of the will. It was also certified that the person meant by *Mary Ann Lee* was *Mary Ann*, the wife of *James Thomas Hearsey*. The Plaintiff *Henry Warner* was also found to be one of the children of *Mary Lee*, one of the residuary legatees mentioned in the will.

The testator at his death had no bank stock, but he was possessed of a sum of £1000 New £3 per Cent. Annuities, and by an order in the cause, in 1858, it had been declared that by the expression "bank stock," the testator meant these annuities, which were ordered to be carried over to a separate account.

By a subsequent order, in 1859, one-third of the dividends was ordered to be paid to *John Antrim* during the life of his wife, or until further order; and the remaining two-thirds were ordered to be paid to *Charlotte Antrim*, on her separate receipt, during her life, or until further order.

On the 16th of November, 1865, *Charlotte Antrim* died, and her husband, *John Antrim* (who was one of the Defendants), having taken out administration to her, now presented a Petition, stating the above facts, and praying that the sum of £1000 stock might be sold, and the proceeds, together with the dividends accrued since *Charlotte's* death, paid to him.

The late *Charlotte Antrim*, in an affidavit filed in the cause on the 14th of March, 1857, deposed as follows:—"The testator was aware of my marriage with the said Defendant, *John Antrim*, from the time of its celebration, and he also knew of my separation from my said husband at the time it occurred. The testator used almost invariably, before and after my marriage, to call me by my Christian name, *Charlotte*, only, and never referred, to my remembrance, to my surname of *Antrim*. After my separation from my husband I adopted another surname, which was known to the testator, but he never called me by it. The testator used to call all the families of his brothers, and amongst them me, by the surname of *Lee*, though" (she went on to say), her father and his brother *Henry* had adopted the surname of *Dean*.

Mr. *Kay*, Q.C., and Mr. *Everitt*, for the Petitioner:—

The gift of interest will carry the fund.

If there be words sufficient to give an absolute interest, it cannot be divested except by words equally clear: *Dowling* v. *Dowling* (1).

Mr. *Druce*, Q.C., and Mr. *Finlaison*, for Mr. and Mrs. *Hearsey*:—

This marriage took place in 1828; the will was in 1849; and *Charlotte* had not seen or heard of her husband for many years previously. The presumption from these facts is, that the testator had forgotten the fact of *Charlotte's* being married.

His intention, clumsily expressed no doubt, was that in any event—either of her marriage or of her death—the fund was to go over.

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(1) Law Rep. 1 Ch. 612. 12 Jur NS 720

If the above presumption cannot be inferred, we then say that *Charlotte* took no more than a life interest, and that upon her death the fund went over. It is monstrous to suppose that the testator, knowing his daughter to be married and separated from her husband, would have made a disposition of which the effect would be to give the fund to her husband at her death.

Mr. *Angelo J. Lewis*, for the Plaintiff *Henry Warner*, also a residuary legatee:—

The fund, after *Charlotte's* death, falls into the residue.

Nothing but a life interest was given to her: *Bird* v. *Hunsdon* (1); the case of *Dowling* v. *Dowling* being distinguishable on the grounds stated by Lord Justice *Turner*. Then, upon *Charlotte's* death did the fund go over? She certainly did not marry, for she was married already; nor did she die unmarried; hence the fund was undisposed of, and must be held to have fallen into the residue.

Mr. *Kay*, in reply:—

If, as we say, the gift of the interest be held to carry the capital, the last argument is in our favour.

SIR W. PAGE WOOD, V.C.:—

In this case the interpretation of the words of the will must be made with a view to extrinsic circumstances.

It is to be observed, first, that the testator calls his daughter *Charlotte Lee*, and not *Charlotte Antrim*; and, secondly, that the gift to her is of the interest only of this fund; and although, no doubt, such a gift, standing alone, would be sufficient to carry the capital, I think the fact ought not, in the circumstances of this case, to be overlooked.

Supposing, then, that the state of facts had been as we may suppose they existed in the testator's mind, judging from the circumstances of his calling his daughter *Charlotte Lee*, and of her husband not having been heard of for many years—in other words that the husband had been really dead—the testator's meaning is plain; namely, that the interest of the stock should be given to

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(1) 2 Sw. 342.

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his daughter, but that no husband of hers was to have the benefit of it. If she should marry again, it was to go over; and if she should die without having been married again, it was to go over.

No doubt there is a certain awkwardness in the fact that she really was married at the time, though the testator may be presumed to have considered her a widow; but, looking at the whole scope of the provision, I think there is a plain intention manifest to exclude any husband of the daughter.

I must therefore hold that, in the events that have happened, the fund has passed over to *Mary Ann*, the daughter of *Thomas Lee*, and her children, as tenants in common; and there will be a declaration accordingly.

Solicitors: Messrs. *Lawrance, Plews, & Boyer;* Messrs. *Wetherfield & Norton;* Mr. *R. B. Barrett.*

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Dec. 6, 7.

Company—Rectification of Register—Misrepresentation in Prospectus—Scienter—Remedy against Directors as well as against Company, notwithstanding subsequent Winding-up Order—Costs of Application for leave to proceed.

next pge

In February, 1865, a company was incorporated with a capital of £25,000, in 2500 shares. The articles provided that the first directors should be determined by the subscribers to the memorandum of association; that the qualification of the directors so appointed should be ten shares, and of future directors, thirty shares; and that the promoter should receive £2500 as promotion money. In the same month a prospectus was issued, giving the names of seven persons of position (not the subscribers to the memorandum), one of them of considerable local influence, as directors, and stating that "the directors and their friends have subscribed a large portion of the capital, and they now offer to the public the remaining shares." The facts were that the directors had subscribed for, nominally, only ten shares each, and actually nothing, for the shares agreed to be allotted to them were fully paid-up shares, for which they paid, and were, by a private arrangement with the promoter, afterwards repaid out of the £2500. The number of shares taken by "friends" of the directors—treating that word as persons who became subscribers through their influence—consisted only of 140, which were taken by one firm. The whole number of shares taken was 762, and agreed to be taken besides, 430. Plaintiff applied, on the faith of the above prospectus,

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Post 464
3 Ch 494
7 Eq 160, -1, -3
4 H.L. 70
10 Eq 78, 79, -80
83, -4, -6, -7
13 Eq 92, -8
16 Eq 374
6 H.L. 381
18 Eq 664
1 Ch D. 185.
2 Ch D. 671-2
3 Ch D. 732.
— 751
4 Ch D. 709
10 Ch D.
505-7
510
4 App Cas
619
5 App Cas
669.
15 Ch D 510
17 Ch D 308,
310-5
23 Ch D 425, -8

for fifty shares, which on the 15th of March were allotted to him, and on which he paid £25 deposit, and £75 allotment money. The directors admitted that the prospectus was issued by their authority:—

Held, that the statement in the prospectus was a clear misrepresentation, which overthrew the contract between the Plaintiff and the company; and that, as the statement related to the directors' own acts, they must be fixed with a guilty knowledge of the misrepresentation.

Since the filing of the bill, and the hearing of a motion for an injunction to stay proceedings in an action upon a call, the company had been ordered to be wound up:—

Held, that the Plaintiff was entitled to repayment of his £100 (but without interest) and costs, against the directors, and (notwithstanding the winding-up) against the company; to have his name removed from the register of shareholders; to an injunction to restrain the company from taking further proceedings on the judgment, and from instituting any other proceedings against the Plaintiff, in respect of his having been a shareholder; with liberty to proceed as he might be advised in the winding-up matter, in respect of the payment of his £100 and costs.

In re Reese River Company, Smith's Case (1) followed.

The costs of an application in the liquidation (in another branch of the Court) for leave to proceed in this suit, were ordered to be included in the costs of the suit.

MOTION for decree.

The bill was filed by the Rev. *James Henry Henderson*, of the *College, Ely*, against Sir *Edmund Henry Knowles Lacon*, Bart., *James Goodson*, *James Packe*, *John Evan Tibbs*, *William Jesse*, and the *Royal Hotel Company of Great Yarmouth, Limited*, stating as follows:

The Defendants were a limited company, registered on the 1st of February, 1865. The object of the company was the purchase or taking on lease of the *Royal Hotel* at *Great Yarmouth*, and the carrying on the business of the hotel, with a capital of £25,000, in 2500 shares of £10 each. The memorandum was signed by *James May*, *Frederick William Howes*, *W. S. Marshall*, *James Stride*, *William Perry*, *Robert Griffin*, and *Thomas Welch Gowar*, for one share each.

The articles of association provided that the names of the first directors should be determined by the subscribers of the memorandum of association or by the majority of them; that the qualification of each director appointed by the subscribers to the memorandum should be the holding of at least ten shares, and the qualification of each future director the holding of at least thirty shares; that the directors should within one month from the day of allotment pay to Messrs. *Howes & Co.*, of No. 58, *Old Broad Street, London*, the sum of £2500 for promotion money; and that they should adopt and carry into effect the two contracts already entered into by Mr. *Frederick William Howes*, dated the 23rd of December, 1864, as agent for the company, for the purchase of the freehold premises in *Great Yarmouth*, and the interest of the tenant therein.

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(1) Law Rep. 2 Ch. 604.

In the month of February, 1865, the Plaintiff's attention was called to the prospectus, which gave as directors of the company the names of the five first-named Defendants, and as auditors, Messrs. *Howes & Co.*, of No. 58, *Old Broad Street*. The prospectus described the objects of the company, and contained, amongst others, the following statement:—

"The directors and their friends have subscribed a large portion of the capital, and they now offer to the public the remaining shares."

On the faith of this prospectus, the Plaintiff, on the 6th or 7th of February, applied for fifty shares, and paid the deposit money of £25. Afterwards, on receiving notice of the allotment, which was made on the 15th of March, he paid £75 as allotment money.

On the 11th of May, 1865, the Plaintiff received a printed notice of a call of £3, for the 13th of June following; and on the 18th of May he wrote to the secretary, making inquiries as to the condition and prospects of the company. The secretary answered by a letter dated the 25th of May, in which he stated: "The affairs of the company are progressing as well as could be expected. The purchase of the freehold has been completed and deposit paid. The leaseholder's interest is also secured by the company, and deposits will be paid to-morrow. . . . The company enters into possession and begins business operations on the 6th of July next. I think the shareholders have no reason for any uneasiness concerning the prospects of the company, which are as favourable as anticipated from the first."

After further inquiries, the Plaintiff wrote to the secretary, and asked for a list of the shareholders of the company; in answer to which, the secretary, on the 25th of June, 1865, sent the list, from which it appeared that the shareholders were only forty-three in number, holding 762 shares; and that only 430 more shares had been agreed to be taken. Of these only ten shares each were held by the directors, and the Plaintiff alleged that the Defendants Sir *E. Lacon*, *Goodson*, and *Tibbs*, became shareholders on the 25th of May, 1865, and the Defendant *Packe* on the 22nd of June, 1865; and the only shares which the Defendants alleged were shares held by themselves and their friends were 390, whereas it was the fact, that such shares amounted to 270 only in number, exclusive of those in the names of the directors themselves.

The bill also alleged that the Defendant Captain *Jesse* did not apply for shares until long after the prospectus was issued, and did not pay up on the shares which were subsequently allotted to him until the 25th of August, 1865.

On the 7th of July, Plaintiff instructed his solicitors, who, on the 8th, wrote, demanding the return of the £25 and £75, on the ground (amongst others which in the result become immaterial) of the statement in the prospectus respecting "the directors and their friends." To this no answer was given.

On the 8th of July Plaintiff received a letter demanding payment of the £150 call, and on the 11th of July an action was commenced for the call.

The bill was then filed, on the 25th of July, charging that "the Plaintiff was deceived by the statements in the prospectus," and prayed that the Defendants the company, and the Defendants the directors, might be restrained from further prosecuting the action against the Plaintiff, or any other action for calls; that the Defendants might be decreed to repay the sums of £25 and £75, with interest; and be ordered to remove the Plaintiff's name from the list of shareholders; for the costs of the suit; and for further relief.

A motion for injunction to restrain the action was made in the month of August, 1865, when it was arranged that judgment should be given in the action to be dealt with as the Court should direct.

The directors, by their answer, filed the 16th of October, 1865, admitted that the prospectus was issued by their direction and with their authority. Sir *E. Lacon* said that he had, previously to the time when such list was furnished to the Plaintiff, agreed to take thirty additional shares, which had since been allotted to him; and Captain *Jesse* had since applied for his ten shares, making eighty in all taken by the directors. They submitted that prior to the first ordinary general meeting no qualification was necessary to enable any person to act as director, and no general meeting had yet been held. The company entered into possession of the *Royal Hotel* and began business on the 6th of July, 1865.

On the 24th of February, 1866, an order was made for winding up the company, on a shareholder's Petition.

By their answer to the amended bill, filed the 26th of July, 1866, the directors said they sanctioned the statements in the prospectus entirely on the authority of *Howes*, the promoter, believing them to be true. Sir *E. Lacon*, Mr. *Goodson*, Mr. *Tibbs*, Mr. *Packe*, and Captain *Jesse*, became shareholders at the dates above mentioned. The total number of shares taken by friends of the directors was 390, held by three or four firms, whose names were given.

In an affidavit, filed the 13th of May, 1867, the Defendants the directors, said they did not in any manner act in the formation of the company, or interfere with the proceedings of *Howes*, until the first board meeting for the allotment of shares, on the 15th of March, 1865. The prospectus was presented at this meeting, upon which occasion *Howes* also produced a list of shares which he said he had placed, amounting, as Defendants believed, to about 900 or 1000. Supposing this was in addition to what they had subscribed, they believed they were justified in proceeding to allotment. In reliance on the good faith of *Howes* they authorized and ratified the publication of the prospectus. As *Howes* had concluded an agreement for purchase for £4500, and £3000 was to remain outstanding on mortgage of the property, leaving only £1500 to be paid in cash, it was thought that the preliminary expenses (including *Howes*' promotion money) need not exceed £6000. Under these circumstances, the directors did not issue shares even to the whole extent of the applications before them, but allotted to themselves and other selected persons only to the value of £4000 or thereabouts. Considering that the contractors and manager might be expected to take shares to the amount of

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£6000, making £10,000 together, the statement about the directors and their friends would, if their expectations had been fulfilled, have been strictly true. The hotel had never been closed; but owing to the filing of the Plaintiff's bill, and the financial crisis together, it became necessary for the directors to consent to the winding-up order.

As to the statement about their friends, the result of the evidence, according to the view of the Court, was, that the directors had mentioned four persons, or firms, who had subscribed as their friends, but that three of these had made affidavits denying the statement. The fourth admitted having, under the influence of the directors, subscribed for 140 shares.

From the minute-book it appeared that only three of the directors—Sir *E. Lacon*, Mr. *Tibbs*, and Captain *Jesse*, were actually present at the meeting of the 15th of March.

Howes, the promoter, who was served with notice to be cross-examined on his evidence for the Plaintiff, did not appear, and his evidence was struck out.

The Plaintiff, on being examined in Court, said he took the shares on the faith of the prospectus, and in the belief that an hotel at *Yarmouth* backed by the influence of Sir *E. Lacon* must succeed.

The directors, on being cross-examined in Court, admitted that although they paid to the funds of the company their qualification money, the amount was afterwards, by agreement with *Howes*, repaid to them by his firm out of the promotion money.

Mr. *Dickinson*, Q.C., and Mr. *J. W. Chitty*, for the Plaintiff:—

Here there was so distinct a misrepresentation on the especial point which was the inducement to the Plaintiff to take shares, that it must be held there was no concluded agreement: *Central Railway Company of Venezuela* v. *Kisch* (1); *In re Reese River Company, Smith's Case* (2); *Ross* v. *Estates Investment Company* (3).

Mr. *W. M. James*, Q.C., and Mr. *Fooks*, for the company:—

The company can only be answerable for misrepresentations of which they, through their agents, have been guilty. If there were

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(1) Law Rep. 2 H. L. 99. (2) Law Rep. 2 Ch. 604.
(3) Law Rep. 3 Eq. 122.

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no agency, there can be no liability. Up to the first board meeting, on the 16th of March, *Howes* was not an authorized agent of the company, though he might have been of five individuals. *Howes*' conduct was a fraud throughout. The true principle of the liability of a company for acts of its directors is laid down in *Western Bank of Scotland* v. *Addie* (1), by the Lord Chancellor (2), and by Lord *Cranworth* (3).

THE VICE-CHANCELLOR:—But you have had the Plaintiff's money.

Mr. *James*:—We and the Plaintiff have had it together. As to the question of the right (if any) of the Plaintiff to relief being the same as it would have been if there had been no winding-up, because he filed his bill before the winding-up order, the *dictum* of Lord *Cairns*, in *In re Reese River Company, Smith's Case* (4), has been dissented from by Lord *Chelmsford*, in *Oakes* v. *Turquand* (5), and by Lord *Colonsay* (6).

Mr. *G. M. Giffard*, Q.C., and Mr. *A. E. Miller*, for the directors, except *Tibbs*:—

The representation that was made to the Plaintiff was the representation of *Howes*, not of the Defendants, who knew nothing about the prospectus till the 15th of March. They did not sign the memorandum of association.

Where circumstances have occurred (as here) to alter the contract, unless the Plaintiff be able to put all the persons against whom he seeks relief in the situation in which they stood when the contract was entered into—if there cannot be a *restitutio in integrum*—the Plaintiff cannot have relief: *Western Bank of Scotland* v. *Addie* (7).

But if he be entitled to any relief, it must be against the company; that is, if they have reaped the benefit (8). There can be no relief against the directors, unless an action of deceit against them would lie.

(1) Law Rep. 1 H. L., Sc. 145.
(2) Ibid. pp. 157, 158.
(3) Ibid. p. 167.
(4) Ibid. 2 Ch. 604, 617.
(5) Law Rep. 2 H. L. 325, 352.
(6) Ibid. p. 378.
(7) Ibid. 1 H. L., Sc. 145, 164.
(8) Ibid. 167.

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In *Cornfoot* v. *Fowke* (1) it was held that an action for constructive fraud would not lie. The Plaintiff there employed an agent to sell a house, knowing of a nuisance of which the agent was ignorant, the agent, upon being asked by the purchaser whether he knew of anything objectionable about the house, replied that he did not; and the Court upheld the purchase. But it is hoped that this is not the law, nor anything like the law.

The company must be looked upon as an individual, and the directors are not to be held liable on the contract, which is the contract of the company. All they are liable to is an action of deceit. You must prove the *scienter* against the directors: *Pasley* v. *Freeman* (2); *Crawshay* v. *Thornton* (3); *Atwood* v. *Small* (4).

In *Hallows* v. *Fernie* (5) the difficulty of holding statements in a prospectus to be misrepresentations is illustrated. The question is, was there or was there not a *scienter* misrepresentation on the part of the directors?

A prospectus is always issued before any allotment of shares takes place, therefore every statement in it must be *in fieri.*

The Plaintiff's statement, that he thought an hotel backed by Sir *E. Lacon's* influence must succeed, shews the true nature of his motive, and that it was not the statement contained in the prospectus. "Friends" of the directors mean, not personal friends or acquaintances, but people who have been induced to take shares by other means than public advertisement. "Large portion," meant a large portion of the allotment the directors were then making.

The directors have received no benefit from *Howes*' fraud, and the bill makes no case against them.

Mr. *T. A. Roberts,* for the Defendant *Tibbs*:—

If the case made by the bill is true, the Plaintiff had a complete defence to the action, and a complete remedy at law: *Clarke* v. *Dickson* (6). [He also cited *Peel's Case* (7); *In re Anglo-Greek Steam Company* (8); *Stewart* v. *Austin* (9).

(1) 6 M. & W. 358.
(2) 2 Sm. L. C. 62.
(3) 7 Sim. 391; 2 My. & Cr. 1.
(4) 6 Cl. & F. 232, 330, 395, 444.
(5) Law Rep. 3 Eq. 520.
(6) E. B. & E. 148.
(7) Law Rep. 2 Ch. 674.
(8) Ibid. 2 Eq. 1. 12 Jur ns 32.
(9) Law Rep. 3 Eq. 299.

The VICE-CHANCELLOR said he was satisfied that the Plaintiff was entitled to have the £100 repaid to him as against both the directors and the company; the only questions were, whether he was entitled as against creditors to have his name removed from the list of contributories; and whether he was entitled to interest upon the £100.

Mr. *Dickinson* in reply:—

The bill was filed and the injunction moved for long before the winding-up. It now appears that we were then entitled to the relief we ask. The Court will restrain proceedings on the judgment, and we say it should also restrain proceedings in respect of calls under the liquidation.

We admit the £100 is not an interest-bearing debt; all we say is, that the Plaintiff, being entitled to complete indemnity, should have the use of his money returned to him.

SIR W. PAGE WOOD, V.C., after stating the frame of the suit, and the prayer of the bill, and having observed that, upon the whole, he thought that the question of relief against the directors was sufficiently raised by the allegations, continued:—

That brings me to the question of whether the bill is true as to the misrepresentations, and it appears to me plainly that there has been a clear and express misrepresentation with reference to the position occupied by the directors.

After declaring the capital to be £25,000, in 2500 shares of £10 each, the prospectus contains the statement that "the directors and their friends have subscribed a large portion of the capital, and they now offer to the public the remaining shares." Upon that alone how does the case stand? What, upon such a statement as that, has the intending shareholder a right to take as distinctly and positively averred? He has a right certainly to conclude that the directors have taken, or with their friends have taken, "a large portion" of the capital. "A large portion" is no doubt in some degree vague, but clearly it would not be satisfied by their having taken a very small portion indeed; still less would it be satisfied by their having taken none. Now that turns out to be the fact with regard to the directors; for literally it can-

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not be said that they had taken or subscribed any portion of the capital in any sense that the word "subscribe" will bear. I quite agree that we are not to construe the word "subscribe" too strictly. It does not necessarily lead us to expect to see a director's name or seal affixed to an instrument, or anything of that kind. I do not say that I should not have been satisfied if I had found that they had *boná fide* intended to take shares, along with their acceptance of the office of director; although, regard being had to *Lord Abercorn's Case* (1), and some others, possibly their acceptance of the office of director might not have bound them to take shares. If there had been such *bona fides* at the time of the prospectus being issued—because it was issued immediately upon the formation of the company, and before there could be any time for anything being formally done—I should have been very far from holding that there was any misrepresentation in saying that they had subscribed for these shares.

But what is the truth? I must say this is one of those cases which surprise one extremely as to the course of proceeding which gentlemen feel themselves justified in taking, and which course I am sure if they were individually concerned they would never think of taking in their own private affairs. They are gentlemen whose names carry weight, and the Plaintiff, who has been examined in Court, says that on seeing the name of one of them, the Defendant Sir *E. Lacon*, whose connection with the town of *Yarmouth* he well knew, and finding that this was to be an hotel at *Yarmouth* "backed by him," as he expressed it, he thought the success of the business of the hotel was very fairly assured, particularly when coupled with this representation—that the directors and their friends had subscribed a large portion of the capital. But instead of their having taken any shares at all, the whole transaction is this: A man named *Howes* has made an affidavit, but he is not to be found, so as to admit of his being cross-examined, and therefore I have struck out his evidence, and I would rather not make any observations upon his part of the transaction, except so far as he is immediately connected with the business in hand, namely, with the position in which he has placed the Defendants the directors. This person, *Howes*, is one of those, I suppose, who

(1) 10 W. R. 451, 548.

have taken upon themselves the name of "financial agents," or something of that sort. He is an accountant. He seems to have determined to concoct this company, and his mode of concocting it was this: Seeking first a set of directors, he goes into, as I once before (1) had occasion to call it, "the director market," and going into the director market he finds these gentlemen, the Defendants, and he tells them he wishes to make use of their names as directors of this company which he is about to project. They say, "Very well, we will act as directors, but we will not, one of us, put a single sixpence into the concern. We will not act as directors unless our qualification be found for us." The qualification is to be only ten shares. *Howes* contrived, very ingeniously, that the first directors to be appointed should only have to be qualified by ten shares, and that the subsequent directors must be qualified by thirty. His reason for doing that no doubt was, that he foresaw there was very little chance of his being able to procure directors unless he furnished them with their qualification, and therefore his scheme was this:—"Let me have your names as directors. You shall have not one single farthing to lay out; I will furnish you with all the shares out of the money that shall be coming in from the intending subscribers; you shall have fully paid-up shares, which will supply you with your qualification. I will give you the paltry sum of £100" ("paltry" I mean with reference to the magnitude of such transactions as some of these are), taking care that I shall be paid £2500 out of the first moneys coming in to the company, and out of that £2,500 I can buy you your shares." So that the whole scheme of the company was this, that the directors were to have these shares found them by the future company.

Now that does seem to me to be a very singular transaction for these gentlemen to engage in. The only consolation that one has in looking at the case is this—I ought, in justice, to make the observation—that this does not appear to have been a bubble company, or anything of that kind. I look upon it as having been intended to be a *bonâ fide* company; that they intended to have an hotel, and possibly the hotel might have been going on at the present moment had it not been for the winding-up. I have no doubt, also, that these gentlemen intended to act as directors; that is to say, when they were provided with their shares, and freed from all risk, I assume they intended to take their places at the board, and discharge their duty in full in carrying on the business of the company. In that respect there was no intention to mislead the public.

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(1) *Kent* v. *Freehold Land Co.*, Law Rep. 4 Eq. 597.

But then the money has to be collected—money with which, as I have observed, *Howes* is to be paid, and with which *Howes* is to pay these gentlemen, no other burden being cast upon them than the trouble of acting at the board, for which, as I understand, there was a remuneration provided for them by the articles. Now was it fair, under these circumstances, to tell the persons who are to find the money to pay for the shares which are to qualify the directors, that "the directors and their friends have subscribed a large portion of the capital?"

I have dealt with the directors; now as to "their friends." That expression requires some explanation. The directors are challenged upon oath to say who are their friends. They name four sets of persons, some of them firms. One of those firms it appears is truly alleged to be a "friend" of theirs, and that firm has taken up about 140 shares. The others all make affidavits and say they are not "friends" of these directors in any sense. I agree with the argument that it is not necessary that the persons answering this description should have been intimate friends. If such persons, not knowing the directors before, had taken shares through their influence, I should have considered them "friends" within the meaning of this prospectus. But they say, "Not a single director spoke to us upon the subject, and we were never influenced by any one of the directors in making our purchase." So that the truth with regard to this statement comes out to be—that the directors have "subscribed" nothing, and that "their friends" consist of one firm who subscribed for 140 shares. I must say I call that a gross misrepresentation, and they who sanctioned it must be fixed with the consequences of having done so.

[His Honour then referred to the other allegations in the bill, as to one of which he did not think it necessary or proper that he should adjudicate; and as to the other, there was a want of evidence, as to which he should, if necessary, have directed an inquiry; and continued:—]

I do not decide the case upon anything but the misrepresentation contained in the paragraph relative to the subscription of a large portion of the capital by the directors and their friends.

1 Ch P. 185
17 Ch D 315

Now as to the issuing of the prospectus: I have the admission of all the directors that it was issued by their authority. As to the three who were present at the meeting of the 15th of March, the case is perfectly clear. The Plaintiff, amongst others, had sent in an application for shares on one of the printed forms which were originally attached to the prospectus. The three directors who were at the meeting consequently had the prospectus coupled with the Plaintiff's application before them; but an application only, not a contract which fixed or bound the Plaintiff in any way. On that day, therefore, they knew that the Plaintiff had made a proposal on the faith of a prospectus sanctioned by them, and containing a misstatement. What then was it their plain duty to have done? They should have said "We cannot contract with this gentleman: the application is based on a misstatement authorized by us: the only thing we have to do now is to tell him that the prospectus is erroneous; and that we cannot accept his application. We must not deceive him; we must return his money." Instead of doing that, they complete the contract, and allot him the shares; and that is the contract with which I have to deal. It is plain that being based upon a misrepresentation the contract cannot stand. The only doubt I had was as to the two directors who were not present at the meeting, but it appears they all admit they authorized the issuing of the prospectus, and to that admission I must hold them.

I make these remarks because I see a distinction upon which recent decisions have thrown a very clear light. I think the cases clearly shew this—that any representations made by the agents of a company which form the foundation of a contract between that company and a third person—those misrepresentations lying at the root of the contract—will entitle the other party to avoid the contract, and the company must in that sense take upon themselves the consequences of the misrepresentations of their agents. The

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contract must be annulled. The position of the agents themselves, who make the misrepresentations, is different. As Mr. *Giffard* has observed, and I go with his argument as regards them, if you are to make them personally liable for the consequences of their misrepresentations, not they, but the party for whom they contracted pocketing the proceeds — as in this instance, the company, for whom the directors may be taken to be acting as agents—you must fix them also with a guilty knowledge of the misrepresentation which is communicated to the person who is to be led into the contract. If you do not fix them with what is technically called the *scienter*, upon an action of deceit, you cannot fix them personally with the consequences of the injury or damage that may result to the Plaintiff who has been so deceived.

In this instance it appears to me that the *scienter* is clearly fixed upon the directors, from the moment you find a representation concerning their own acts which is incorrect, and which they must be taken to have known to be incorrect, and to have knowingly stated, and thereby to have misled the party complaining of the misrepresentation. I must say I think the result of all the cases which have occurred shews the great value of that golden legacy, if I may so term it, which has been left to us by Sir *Richard Kindersley*, who has condensed in few words the whole doctrine as to the rule of conduct between shareholders and their directors, in the case of the *New Brunswick and Canada Railway Company* v. *Muggeridge* (1), a case cited with approbation in the case of the *Central Railway Company of Venezuela* v. *Kisch* (2) in the House of Lords.

6 HL 381

13 Eq 92

It seems to me that the directors, in this instance, have clearly sinned against that canon in the course they have taken.

The Plaintiff is therefore entitled to a decree for the repayment of the £100 from the directors personally. Further than that, he is entitled to an injunction restraining the continuance of the proceedings at law. He is also entitled to a declaration that the company, being now in liquidation, are bound to repay to him this £100; and to an injunction restraining them from proceeding on the judgment: and also from proceeding against him in respect of any further calls.

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(1) 1 Dr. & Sm. 363.

(2) Law Rep. 2 H. L. 113.

7 Jur N S 132.

7 Eq 161

Thereby I seem to impinge, in some slight degree, upon the difficulty suggested by the Lord Chancellor, and possibly, to a certain extent, not unfavourably regarded by Lord *Colonsay* and other of their Lordships who gave judgment in *Oakes* v. *Turquand* (1), namely, whether or not a person who by fraud has been led into the position of a partner in one of these concerns can be removed from the position of a contributory. I think, however, that in reality, if I had to fall upon that difficulty, I should not be able to rely upon the dicta of two noble Lords, however eminent, in moving judgment, against an actual decision upon that very point in a Court of higher jurisdiction than this, in the case of *In re Reese River Mining Company, Smith's Case* (2). But, further than that, it appears likely that the question of contributory or no contributory may be raised hereafter in a different manner, before the tribunal which can alone decide it, namely, the Court in which the winding-up is now pending. I think the Plaintiff, having filed his bill and applied for an injunction before the winding-up, is entitled to the decree I am now making, in order to save him from all the consequences from the time of filing the bill that would result from any suit or action on the part of the company against him in respect of the calls.

There will, consequently, be a declaration that the Defendants the company are bound to repay to the Plaintiff the sums of £25 paid by him by way of deposit, and £75 paid by him on the allotment of fifty shares allotted to him by the said company, the application of the Plaintiff for such shares having been made on the faith of the prospectus in the bill mentioned, which prospectus untruly alleged that the directors and their friends had subscribed a large portion of the capital. Then a declaration that the Defendants the directors are also bound to repay to the Plaintiff the said two sums of £25 and £75; and declare that the Plaintiff is entitled to have his name removed from the register of the company, and let the same be removed accordingly. Then an injunction to restrain the Defendants the company from taking any further proceedings on the judgment, and from instituting any other proceedings against the Plaintiff in respect of his being, or having been, a shareholder in the company. Then a direction that the Defendants do pay the

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(1) Law Rep. 2 H. L. 352, 378.

(2) Law Rep. 2 Ch. 604.

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£100, but without interest. (It does not appear to me a case for interest.) The £100 to be paid within one month from the date of the decree. The Plaintiff to be at liberty to proceed as he may be advised in the matter of the winding-up in respect of the payment of the £100. The costs of the suit to be taxed, including the Plaintiff's costs at law; and let the Defendants generally be directed to pay such costs; with liberty also to the Plaintiff to go in under the winding-up in respect of such costs as against the company.

The Plaintiff's costs will also include his costs of an application to the Master of the Rolls, by motion for leave to proceed in this suit.

Solicitors for the Plaintiff: Messrs. *Hardisty & Rhodes.*
Solicitor for Mr. *Tibbs:* Mr. *A. Sidney.*
Solicitor for the other Directors: Mr. *J. W. Wilson.*
Solicitors for the Company: Messrs. *Wilson, Bristows, & Carpmael.*

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22 Ch D 367

In re IMPERIAL MERCANTILE CREDIT COMPANY.

Practice—Winding-up—Absconding Contributory—Companies Act, 1862, *s.* 118.

Upon evidence that a contributory was about to sell off his goods and chattels for the purpose of evading payment of a call, the Court, reading sect. 118 of the *Companies Act*, 1862, alternatively, made an order for the seizure of his goods, &c., but declined to order his arrest upon a mere hearsay statement of his intention to leave the *United Kingdom.*

MR. *LINDLEY* applied *ex parte*, on behalf of the official liquidators of the *Imperial Mercantile Credit Company, Limited*, for an order, under sect. 118 of the *Companies Act*, 1862 (1), against a con-

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(1) Sect. 118: "The Court may at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory to such company is about to quit the *United Kingdom*, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, moneys, securities for moneys, goods and chattels, to be seized, and him and them to be safely kept until such time as the Court may order."

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tributory, on the ground that he was about to abscond, and had advertised his property for sale on the following day (20th of December).

A letter had been received by one of the official liquidators from a solicitor at *Devonport*, stating that the contributory in question (the pending and unpaid calls on whose shares amounted to £176), who was a chemist and druggist at *Devonport*, had advertised his property for sale on the 20th of December, and that it was well known in the neighbourhood that he was about to proceed to *Lisbon.*

SIR W. PAGE WOOD, V.C.:—

I am not disposed to take the very strong step of arresting this gentleman without some more definite information upon oath as to his being about to abscond; but I think there is enough to induce me to stop the sale of his property until further notice.

Dec. 20. Mr. *Lindley* renewed his application upon an affidavit by the solicitor at *Devonport*, stating that it was commonly reported, and that he had on inquiry made that day been informed, and verily believed it to be true, that Mr. *C.* (the contributory) was about to leave *England* at a very early date, and would leave *England* for *Lisbon* if he was not forthwith apprehended. He (deponent) also stated that he had that day been informed that *C.* assigned as a reason for his leaving *England*, that he would thereby avoid further liabilities as one of the contributories of the company.

Annexed to this affidavit was a handbill announcing the sale by auction of his property and effects on the 20th of December.

THE VICE-CHANCELLOR:—It is only information after all. I cannot arrest him upon such an affidavit.

Mr. *Lindley*:—There would be no difficulty in obtaining a *capias* upon it. The section only requires proof to be given "that there is probable cause for believing that any contributory is about to quit the *United Kingdom*, or otherwise abscond."

At all events, I ask for an order in terms more extensive than a

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mere injunction to stop the sale advertised to take place, which does not include all his property and stock in trade.

SIR W. PAGE WOOD, V.C.:—

The contributory is indebted for the call, and I think it is sufficiently proved that he is about to remove his goods to evade payment, so that I may order the official liquidators to cause his books, papers, moneys, securities for moneys, goods, and chattels, to be seized, and them to be safely kept until further order. The section, it is true, contemplates the arrest of the contributory at the same time as the seizure of his goods. But I think I may read it as authorizing me to order the one without ordering the other.

Solicitors: Messrs. *Ashurst, Morris, & Co.*

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LEITE *v.* JOHNSTON.

Practice—Motion to dismiss—Time—Cons. Ord. XXXIII., *Rule* 10—*Cons. Ord.* XXXVII. *Rule* 13.

A Defendant is not entitled to move to dismiss for want of prosecution until the expiration of four weeks (excluding vacations) from the time when the answer is deemed sufficient.

MOTION to dismiss for want of prosecution.

The answer was put in on the 16th of September, 1867, and no step had since been taken by the Plaintiff, no order having been obtained by him to enlarge the time.

Mr. *Fischer*, in support of the motion, contended that, starting from the 10th of December, on which day the answer became sufficient, the four weeks given to the Plaintiff by Cons. Ord. XXXIII., Rule 10, expired on the 8th of January, and thereupon the Defendant was at once entitled to move to dismiss.

Mr. *W. F. Robinson*, for the Plaintiff:—

From the 10th of December, when the answer became sufficient, the Plaintiff has four weeks within which to take the several courses pointed out by Order XXXIII., Rule 10, and the four weeks does not include the times of vacation (Order XXXVII., Rule 13), so that allowing for the Christmas Vacation (24th of December to the 6th of January) the time given to the Plaintiff for exercising his option does not expire until the 21st of January, and, consequently, the motion is premature.

Mr. *Fischer*, in reply.

SIR W. PAGE WOOD, V.C., said that the scope of the Order was that the Defendant should not be entitled to move to dismiss until the Plaintiff had neglected doing all which, by the rules of the Court, he had the option of doing. Order XXXIII., Rule 10, provided that the Defendant might move to dismiss, and the Court might order accordingly, where the Plaintiff, having obtained no order to enlarge the time, did not take one or other of the proceedings there pointed out within four weeks after the answer was held or deemed to be sufficient. Then Order XXXVII., Rule 13, provides that the times of vacation shall not be reckoned in the computation of the times appointed or allowed for (amongst other purposes) "amending or obtaining orders for leave to amend bills." That was one of the things mentioned in Order XXXIII., Rule 10, upon which the Plaintiff had four weeks within which to exercise his option, and though there was some little ambiguity in the matter, the two Orders must, he thought, be read together, and the Defendant could not move to dismiss until the expiration of four weeks (excluding vacations) from the time when the answer became sufficient. The motion was premature and must be refused, as the Defendant was bound to wait until the time given to the Plaintiff for all these several operations had expired, and in the computation of that time vacations were not to be reckoned.

Solicitors: Messrs. *Chester & Urquhart;* Messrs. *Field, Roscoe, & Co.*

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Jan. 11;
Feb. 7.

JOHNSON *v.* FOULDS.

Will—Gift to Children of Tenant for Life, other than Eldest or only Son entitled as Tenant to Estate Tail in remainder—Only Son born after Forfeiture by Tenants for Life—Vesting.

A testatrix devised an estate at *T.* to *J.* for life, with remainders to the sons and daughters of *J.* successively in tail, with remainders over, and with a proviso that if any tenant for life or in tail in possession should neglect to reside on the *T.* estate for six months, the estate of him and of the issue of his body should thenceforth cease, and the *T.* estate should go to the person next entitled in remainder, as if the person so neglecting to reside were then dead without leaving issue; and she bequeathed her residuary personal estate in trust for the children of the person who should at her death become tenant for life of the *T.* estate (other than and besides an eldest or only son or an eldest daughter for the time being entitled in tail in remainder expectant on the death of his or her parent to the *T.* estate) who should attain twenty-one or marry, and if there should be but one child besides such eldest or only son or eldest daughter for the time being entitled as aforesaid, then in trust for that one child, with a gift over in case there should be no such child, or all such children should die before any of them should attain a vested interest.

J. survived the testatrix, neglected to reside on the *T.* estate for six months, and died leaving a posthumous son, *D.*, who was his only child:—

Held, that as *D.*, by reason of the forfeiture incurred by *J.* before his birth, never was tenant in tail in remainder of the *T.* estate, he was entitled to the residuary personal estate, and that being an only child he took a vested interest at his birth.

MARY *FOULDS* by her will, made in 1811, devised a freehold estate, called the *Trawden* estate, to the use of trustees for 500 years, upon trust out of the rents to pay certain annuities, and after the expiration of the term, and subject thereto, to the use of other trustees and their heirs upon trust to preserve contingent remainders, and subject thereto in trust for *James Pilling*, eldest son of *William Pilling*, of *Rings*, for life, with remainder in trust for his first and other sons successively in tail male, with remainder in trust for his first and other sons successively in tail, with remainder in trust for his first and other daughters successively in tail, with remainder in trust for the second and other sons of *William Pilling*, of *Rings*, successively in tail male, with remainders over. The will contained a proviso, that if any person or persons for the time being beneficially entitled in possession or in remainder immediately expectant on the determination of the term of 500 years, for life or in tail, to the *Trawden* estate, and being of the age of twenty-one years, should refuse, decline, or neglect to reside in the mansion house on the estate for six successive calendar months in any one year, the estate and interest of him, her, or them, and also of the issue of his, her, or their body or bodies, in the *Trawden* estate should from thenceforth cease and determine and be void, and the *Trawden* estate should immediately thereupon go to the person or persons next entitled in remainder, "as if he, she, or they, so refusing, declining, or neglecting as aforesaid, was or were then actually dead without leaving any issue inheritable under such entail." The testatrix bequeathed her residuary personal estate to trustees upon trust to convert and invest, and to hold the same and the investments thereof "upon the trusts following, that is to say, in case any of the persons hereby made tenants for life of" the *Trawden* estate "shall be or become at and upon my decease beneficially entitled in possession or in remainder immediately expectant on the determination of the said term of 500 years to the same premises under the limitations hereinbefore contained, and shall have any child or children (other than and besides an eldest or only son or an eldest daughter, for the time being beneficially entitled under the limitations aforesaid for an estate in tail male or in tail in remainder immediately expectant on the decease of his or her parent to the same premises)," the said trust funds should be in trust for such children or child or their issue, as such tenant for life should appoint, and in default of such appointment "in trust for all and every the children and child of such tenant for life (other than and besides an eldest or only son or an eldest daughter so for the time being entitled as aforesaid)," who being a son or sons should attain twenty-one or die under that age leaving issue living at the time of his or their decease or respective deceases, or who being a daughter or daughters should attain twenty-one or marry, and (if more than one) in equal shares, "and if there shall be but one child (besides such eldest or only son or eldest daughter for the time being entitled as aforesaid), then in trust for that one child." The testatrix then directed that, until the trust funds should become vested, or until it became impossible that they should vest, in some child or

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children or issue of such tenant for life, the income should be accumulated "during such minority or respective minorities or other suspense of vesting," and the accumulations should be in trust for the person or persons who, under the will, should be entitled to a vested interest in the fund from which the accumulations should have proceeded, and in case there should be no tenant for life who should at his death become so beneficially entitled and should have any such child or children (other than such eldest or only son or eldest daughter so entitled for the time being as aforesaid), and any person by the will made tenant for life of the *Trawden* estate should have died in her lifetime and have left an eldest or only son or an eldest daughter, who should at her death become entitled as tenant in tail to the said estate, and also one or more other child or children living at her death, then the trust fund was to be held upon similar trusts for the benefit of such last-mentioned younger child or children, and in case there should be no tenant for life either so entitled upon her death, or so dying in her lifetime, who should have such children or child other than an eldest or only son or an eldest daughter for the time being entitled as aforesaid, or, there being such tenant for life, in case all and every such children or child should die before any of them should under the trusts aforesaid become entitled to an absolutely vested interest in the trust funds, then and thenceforth the trust funds should be upon trust for the brothers and sisters of the persons who might be next entitled to the *Trawden* estate, and the children of such of them as might be deceased, such children to take their parents' shares.

The testatrix died in 1817, leaving no next of kin. *James Pilling*, who shortly afterwards took the name of *Foulds*, attained twenty-one in 1828, and in 1859, being then a bachelor, he neglected to reside in the mansion house on the *Trawden* estate for six months, and shortly afterwards *William Pilling*, the second son of *William Pilling*, of *Rings*, took possession of the *Trawden* estate under the clause of forfeiture. *James Foulds* married in 1861, and died in 1864, leaving his wife *enceinte* with a son, the Defendant *J. H. D. Foulds*, who was his only child. *James Foulds* made no appointment of the testatrix's residuary personal estate.

William Pilling, of *Rings*, who died in 1850, had, besides his sons *James* and *William*, several children, of whom some were born in the lifetime of the testatrix, and some after her death. Some of these children were dead, and one had left children.

In 1864 this suit was instituted by the representative of the surviving executor and trustee of the will of *Mary Foulds*, for the execution of the trusts of her residuary personal estate. The infant, *J. H. D. Foulds*, and the surviving younger children of *William Pilling*, of *Rings*, were Defendants, and the representatives and children of his deceased younger children, and the Crown (the testatrix having left no next of kin), had been served with notice of the decree. The cause now came on for further consideration.

It was assumed by all parties that the limitations of the *Trawden* estate to the children of *James Foulds* were destroyed by his forfeiture.

Mr. *Prendergast*, Q.C. (with him Mr. *Charles Hall*), for the plaintiff.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the infant, *J. H. D. Foulds*:—

First: Upon the strict literal construction of the language of the will, *J. H. D. Foulds* is entitled to the residuary personal estate. *James Foulds* was a person by the will made tenant for life of the devised estate, who became at the death of the testatrix entitled in possession to the same; *J. H. D. Foulds* is the child of *James Foulds*, and he is not, and never has been, "for the time being beneficially entitled for an estate tail in remainder immediately expectant on the decease of his parent in the same premises." As there were no objects of the gift in existence at the testatrix's death, the class of children of *James Foulds* who were to take the residuary estate must be ascertained at the death of the parent, allowing for the period of gestation: *Armitage* v. *Williams* (1); *Wyndham* v. *Wyndham* (2); and the other cases cited on this point in *Jarman* on Wills (3). Even if *J. H. D. Foulds* had been born before the forfeiture of the devised estate, he would not have been excluded from the gift of the residue, because at the time when the class was to be ascertained he would not have been "for the time being" tenant in tail in remainder of the devised estate: *Ellison* v. *Thomas* (1); *Stanhope* v. *Collingwood* (2); *Adams* v. *Beck* (3). There is no reason for imputing to the testatrix the intention of extending the operation of the clause of forfeiture of the *Trawden* estate, so as to exclude the children of a person incurring such forfeiture from taking the residuary personal estate, and even if such an intention were probable, the Court cannot give effect to a probable intention against the language of the will: *Grey* v. *Pearson* (4).

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(1) 27 Beav. 346.

(2) 3 Bro. C. C. 58.

(3) 3rd Ed. vol. ii. p. 154.

Secondly: *J. H. D. Foulds* took a vested interest in the residue at his birth. The trust is for all and every the children and child who should attain twenty-one or leave issue, or marry, and if there should be but one child, then in trust for that one child, and the latter trust would be superfluous if it had not been inserted for the express purpose of excluding, in the case of an only child, the condition attached to the previous trust, of attaining twenty-one, leaving issue, or marrying. He is, therefore, entitled to the income of the residue from his birth. He is also entitled to the accumulations of the income during twenty-one years from the testatrix's death. The accumulations from the end of that time until his birth are, under the *Thellusson Act*, undisposed of, and belong to the Crown.

Mr. *Baggallay*, Q.C., and Mr. *Bagshawe*, for younger children of *William Pilling*, of *Rings*, who were living at the death of the testatrix, or their representatives:—

First: The class of persons who were to take the residuary personal estate must be ascertained at the death of the testatrix. In the introductory sentence, upon which the whole gift to the children of the tenant for life depends, the words "at or upon my decease" must be taken to govern the words, "and shall have any child or children, &c.," so that only children born at the testatrix's death can take. The Court will be reluctant to adopt a construction which would suspend the vesting of the property during the life of the tenant for life, and create an intestacy as to the income after twenty-one years from the testatrix's death. The exception of a son or daughter for the time being entitled in remainder expectant on the death of the parent, proves that the class was to be ascertained in the lifetime of the parent.

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(1) 1 D. J. & S. 18. 8 Jur NS 1138
(2) Law Rep. 4 Eq. 286.
(3) 25 Beav. 648.
(4) 6 H. L. C. 61. 3 Jur Ns

Secondly: *J. H. D. Foulds* does not come within the words of the gift. The gift to the children or child of the tenant for life, other than and besides an eldest or only child for the time being entitled in remainder, cannot embrace the child of a person who, when the child was born, had ceased to be tenant for life, and none of whose children could then have been entitled in remainder. The testatrix clearly intended her personal estate to be a provision for the younger brothers and sisters of the first tenant in tail of the *Trawden* estate, and it would be contrary to the whole scope and object of the will to give it to the family of a person who had forfeited his own and his children's interest in that estate. We contend, therefore, that the younger children of *William Pilling*, of *Rings*, living at the death of the testatrix, as the brothers and sisters of *William Pilling*, the person next entitled to the *Trawden* estate, were entitled to the residuary personal estate.

Mr. *Southgate*, Q.C., for younger children of *William Pilling*, of *Rings*, born after the testatrix's death, or their children or representatives:—

The class must be ascertained at the time of the forfeiture. The children of a tenant for life, in order to take, must have been born while the parent was tenant for life. Upon the forfeiture, the gift over of the residuary estate took effect in favour of the brothers and sisters of *William Pilling*, the son, then living, and the children of those who were then dead.

The *Solicitor-General* (Sir *C. J. Selwyn*), and Mr. *Wickens*, for the Crown:—

We support the contention of *J. H. D. Foulds* upon the main question, but we say that his interest is contingent on his attaining twenty-one, or leaving issue, and, consequently, that until either one of those events happens, or he dies under age without leaving issue, the income of the residuary estate is undisposed of, and belongs to the Crown. The condition of attaining twenty-one, or leaving

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issue, which is expressly attached to the gift to all the children, must be extended by implication to the gift to an only child, especially as the ultimate gift over is to take effect upon the death of all and every the children or child "before any of them shall become entitled to an absolutely vested interest." We admit that the income accumulated during twenty-one years from the testatrix's death will belong to the person or persons in whom the capital ultimately vests, but the Crown is entitled to the income of such accumulation during the suspense of vesting.

Feb. 7. LORD ROMILLY, M.R., after stating the facts and the material clauses of the will, continued:—

The question is, who, in these circumstances, is entitled to the residuary personal estate under the trusts of the will, which I have already stated at length? The bequest of the residuary personal estate is for the benefit of the child or children "other than and besides an eldest or only son or an eldest daughter for the time being beneficially entitled under the limitations of the will for an estate in tail male or in tail in remainder immediately expectant on the decease of his or her parent to the same premises." I think that in this case I must follow the precise words of the will, and not put upon them a construction which, though it is possible that the testatrix intended it, is not the exact meaning of the words she has used. The gift is not to the child or children of the tenant for life other than an eldest child, but other than an eldest child for the time being "entitled as aforesaid," that is, entitled under the limitations aforesaid for an estate in tail male or in tail general in remainder immediately expectant on the decease of his or her parent to the same premises. Therefore an eldest son is not excluded unless he be so entitled. I think that I may properly read this clause as if the name of *James Pilling*, the first tenant for life, were inserted in this place, instead of the description of him by the words "such tenant for life;" if so, it seems to me that the conclusion must follow, that *J. H. D. Foulds* is the person entitled. It is true that he is the only son of *James Pilling*, but he is not entitled, under the limitations contained in the will, to an estate tail, or, indeed, to any estate, in the hereditaments devised; and he never was so entitled, because this remainder was destroyed by the forfeiture of his father before he was born. Why did the testatrix impose the peculiar condition of being "so entitled as aforesaid" in the case of an only son, unless she had foreseen the possibility of there being such an only son who might be unable to take anything under the prior limitations contained in her will relating to the *Trawden* estate? And yet it was only by reason of the forfeiture clause that the only son of a tenant for life could be so excluded, and even then only in case he was born after the tenant for life had forfeited the property; and I think, as I have already said, that the words "tenant for life" do not mean a person who is actually tenant for life at the moment of the birth of the child, in which case the condition would be superfluous, but that it means any of the persons to whom a life estate is devised by the testatrix; in other words, that it may be read as if the names of all the tenants for life were introduced severally and in succession into the will itself. It is therefore my opinion that *J. H. D. Foulds* accurately fills the description in the will, and I am of opinion that I should, if I rejected him, be departing from the spirit as well as the literal meaning of the words used by the testatrix, in order to exclude the son of a tenant for life, who can take nothing under the previous limitations of the *Trawden* estate. It is also to be observed the gift over contains the same words, namely, a child "so entitled as aforesaid," clearly pointing out that an eldest or only son, as such, was not to be excluded, but only an eldest or only son entitled in remainder to an estate tail in the devised estate, expectant on the death of his parent.

A second question is raised on the subject of accumulation under the *Thellusson Act*, namely, whether the Act applies to the income subsequently to the birth of *J. H. D. Foulds;* and this depends on the question, whether *J. H. D. Foulds* took a vested interest at his birth. The will makes a distinction between the case of there being more children than one of the tenant for life, and the case of there being only one such son. In the former case the gift is to such of them as shall attain twenty-one or leave issue; in the latter case no such condition is annexed; but it is, "if there shall be but one child, then to be in trust for that one

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child." It vested, therefore, in him on his birth, and the statute from that time ceased to apply.

Solicitors: Messrs. *Ridsdale & Craddock;* Messrs. *Austen, De Gex, & Harding;* Mr. *H. B. Clarke;* Messrs. *Raven & Bradley.*

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8 Eq 579
5 Ch 77
13 Eq 41.

BUTLER *v.* CARTER.

Trustee and Cestui que Trust—Breach of Trust—Acquiescence—Right of Cestui que Trust, who is also Trustee, to recover Trust Fund—Statute of Limitations.

By a marriage settlement made in 1821, stock belonging to the wife was assigned to *B.* and another, upon trust for the separate use of the wife for life, with remainder for the husband for life, with remainder, in default of children of the marriage, for *B.* The trustees neglected to have the stock transferred to them, and it remained in the name of the wife, and in 1822 the husband sold it, and possessed himself of the proceeds. *B.* died in 1829, the husband in 1858, and the wife in 1864. There were no children. In 1866 *B.'s* executors claimed the trust fund from the husband's estate:—

Held, that their claim was not barred by the *Statute of Limitations*, or by acquiescence, or by the fact that *B.* was one of the trustees whose negligence rendered the misapplication of the trust fund possible.

THIS was a summons to vary the Chief Clerk's certificate in a suit for the administration of the estate of *W. Butler*, by disallowing a claim made against the estate in respect of certain trust funds comprised in his marriage settlement which the Chief Clerk had allowed.

By the settlement made in November, 1821, upon the marriage of *W. Butler* and *Elizabeth Ballard*, several sums of Consols, Long Annuities, and Navy Five per Cent. Annuities, belonging to *Elizabeth Ballard* were assigned by her, with the consent of *W. Butler*, to *Samuel Ballard* and *Cornelius Butler*, with a power of attorney to receive and transfer the funds, upon trust to pay the income to *Elizabeth Ballard* for life for her separate use, and after her death to *W. Butler* for life, and after the death of the survivor upon trust for the children of the marriage, and if there should be no child, in trust for *Samuel Ballard* and *W. Butler* in equal moieties.

Samuel Ballard was the only brother of *Elizabeth Ballard*, and it appeared from a letter written by him shortly before the marriage, that he thought it was improbable that she would have children, and also that he supposed that her property "would revert to his family."

At the date of the settlement some of the settled funds were standing in the name of *Elizabeth Ballard*, and the remainder were shortly afterwards transferred into her name; but none of them were ever transferred to the trustees. In 1822, 1824, and 1825, *W. Butler* and his wife sold out the whole of the settled funds, and he applied the proceeds for his own use. *Samuel Ballard* died in 1829. There was no evidence that he knew of the sale of the funds.

There were no children of the marriage. *W. Butler* died in December, 1858, having by his will, made in May, 1858, directed his executor to pay out of the proceeds of his residuary estate all claims and demands to which his estate might be liable under his marriage settlement. *Elizabeth Butler* never made any claim in respect of the trust funds, and died in May, 1864. In 1866 this suit was instituted by the residuary legatee of *W. Butler* against his executor. Under the decree the claim in question was brought in by the representatives of *Samuel Ballard* for the amount of a moiety of the proceeds of the trust funds comprised in the settlement, with interest from the death of *Elizabeth Butler*. The Chief Clerk, by his certificate, allowed the claim.

The Long Annuities would have expired in 1860, and as, under the trusts of the settlement, *Elizabeth Butler* would have been entitled to them *in specie*, counsel for the claimants, in the course of the argument, abandoned their claim in respect of them.

Mr. *Baggallay*, Q.C., and Mr. *Everitt*, for the Plaintiff:—

At the time of *W. Butler's* death his estate was not liable to replace the funds comprised in the marriage settlement. The assignment of the stock to the trustees without a transfer cannot be put higher against *W. Butler* than a covenant by him to transfer the funds, of which upon the marriage he became the legal owner, and such a covenant would not have made him a trustee of the funds, but would have created a debt, against which the *Statute of*

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Limitations would have begun to run from the time of the marriage: *Spickernell* v. *Hotham* (1), and which, therefore, would have long since been barred. Even the children of the marriage, though they could have made the trustees liable for not procuring a transfer of the funds, could not have enforced a claim against the estate of *W. Butler*, much less can such a claim be enforced by the representatives of *Samuel Ballard*, whose interest was that of a mere volunteer, and who was one of the trustees by whose neglect the loss of the fund was permitted. Moreover, as he lived for several years after the sale of the funds, and took no steps to have them replaced, though he knew Mrs. *Butler* was not likely to have children, it must be presumed that he assented to the sale, and gave up his interest in the funds, which was probably given to him by the settlement in consequence of an erroneous impression that he had a reversionary interest in his sister's property.

If the liability had ceased at the death of *W. Butler*, it was not revived by his will, which merely pointed out the fund out of which the liability, if it existed, should be satisfied. A trust for payment of debts does not revive a debt barred by the statute: *Burke* v. *Jones* (2).

Mr. *Southgate*, Q.C., and Mr. *Darby*, for the claimants:—

The claim is not barred by the *Statute of Limitations*. In the first place, *W. Butler*, by getting possession of the funds of which trusts had been declared by the settlement to which he was a party, made himself a trustee of them upon the express trusts of the settlement: *Coxwell* v. *Franklinski* (3). In *Spickernell* v. *Hotham* there was a covenant to transfer a fund belonging to the covenantor, but here there was a specific fund, ear-marked and impressed with the trusts of the settlement, which afterwards wrongfully came into the possession of *W. Butler* with notice of the trust. This case, therefore, is within the third branch of *Spickernell* v. *Hotham*. In *Burrowes* v. *Gore* (4), where a father, upon his daughter's marriage, gave bonds to the trustees of her marriage settlement for sums of money to be held upon the trusts of the

(1) Kay, 669.
(2) 2 V. & B. 275.
(3) 11 L. T. (N. S.) 153.
(4) 6 H. L. C. 907. 4 Jur N S

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settlement, the majority of the House of Lords held that, as between the obligor and the *cestuis que trust* under the settlement, the *Statute of Limitations* did not apply. Secondly: As the interest of the present claimants did not arise until the death of Mrs. *Butler* in 1864, the *Statute of Limitations* as against them only began to run from that time: *Burrowes* v. *Gore* (1); and for the same reason they are not barred by laches or acquiescence. The will of *W. Butler* creates a trust for the satisfaction of this claim; at all events, it proves that he believed himself to be under some liability in respect of the settlement, which belief is inconsistent with the hypothesis that he appropriated the funds to himself with the consent of *S. Ballard.* The fact that *S. Ballard* committed a breach of trust, by neglecting to procure a transfer of the trust funds, cannot be set up by those who claim under *W. Butler*, who took advantage of that breach of trust to get possession of the funds.

Mr. *Jessel*, Q.C., and Mr. *Nalder*, for the Defendant, the executor of *W. Butler.*

Mr. *Baggallay*, in reply.

Feb. 10. LORD ROMILLY, M.R.:—

This summons is brought before me for the purpose of obtaining the decision of the Court as to whether the estate of the testator, *William Butler*, is accountable for a sum of money settled on his marriage, and received and applied by him for his own use. The peculiarity of the case is, that the persons seeking to make the estate of the testator liable are the representatives of Admiral *Ballard*, the brother of Mrs. *Butler*, who was himself the trustee of the settlement, and whose duty it was to take care that the funds so settled were not misapplied. [His Lordship stated the facts, and continued:—] In the first place, it is said that the widow acquiesced in this breach of trust for five-and-a-half years, and that, therefore, the claim cannot be sustained. I think that this would bar the claim of her legal personal representatives to the dividends which would have accrued due during her life or widowhood, but that it can have no effect on the rights of the persons entitled in reversion after her decease.

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(1) 6 H. L. C. 907. 6 Jur NS 1244

In the next place, it is contended that the claim is barred by the *Statute of Limitations*; but I am of opinion that the *Statute of Limitations* has no application to this case. This interest did not arise until the death of the widow, and until the death of the husband it was (legally at least) uncertain whether Admiral *Ballard* or his representatives would have any interest at all. The statute did not, in my opinion, begin to run until their interest arose in May, 1864.

The remaining objection at the time struck me as more important. It was this:—Admiral *Ballard* filled the double character of trustee and *cestui que trust.* In his character of trustee he committed a breach of trust in not taking care that the trust funds were transferred into his name, the consequence of which would have been, that, if there had been any children of the marriage, he might have been compelled, in a suit instituted by them, to replace the trust funds. If there had been issue of the marriage, and such a suit had been instituted, the husband would have been made a Defendant to it, and would have been primarily liable to make good the trust funds; and it is contended that Admiral *Ballard* must be taken to have been cognisant of the law and the facts of the case. It is further contended that it is evident from the correspondence that he anticipated (by reason of the age of his sister) that there would be no issue of the marriage, and that he was also cognisant that the trust funds were left to the control of his sister and of her husband, and that they had sold out and misapplied these funds; and hence it is argued that, as he must have been cognisant of all these facts, it is but a fair inference to draw that he intended to relinquish, and that he did relinquish and abandon in their favour, all his right and claim to the reversion of one-half of the settled property. Whether this contention could have been sustained if Admiral *Ballard* had lived for many years in habits of friendly intercourse with his sister and her husband, and the fact of his being cognisant of the sale of the funds by them had been proved, I do not mean to express any opinion; but in the absence of any evidence on this subject I could not properly draw such an inference from the circumstance that for eight years he took no step for the security of the trust funds. I must therefore look at him in his character of *cestui que trust* as distinct from his character of trustee, and I am of opinion that although he could not, as *cestui que trust*, call upon his co-trustee to replace the stock which they had both permitted to be sold out and misapplied, still that he is entitled to call on the person who actually received and spent the money to pay to him that part of it which, in the events which have happened, became his property. Unless from the combined effect of his being both trustee and *cestui que trust* I am compelled to apply a different rule, there could be no question on this subject. A child of the marriage, for instance, could clearly compel the estate of the testator to refund the money, and the time would be no bar to his claim. So also if the limitation in default of children had been for the next of kin of the wife as if she had died unmarried, they could have compelled restitution. The combined character of trustee and *cestui que trust* does not, in my opinion, constitute such a case of acquiescence as to bar the representatives of Admiral *Ballard* from enforcing this claim. The claim, however, must be confined to the stock. The Long Annuities expired in 1860, and the widow was clearly entitled to the whole of the dividends. The certificate must, therefore, be varied by disallowing so much of the claim as relates to the Long Annuities.

Solicitor for the Plaintiff: Mr. *John Turner.*
Solicitor for the Defendant: Mr. *Woodard.*
Solicitors for the Claimants: Messrs. *Crawley, Arnold, & Green.*

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March 7, 9.

In re LIVERPOOL IMPROVEMENT ACT.

Lands Clauses Consolidation Act, s. 82—*Costs of deducing Title to Lands—Costs of taking out Administration.*

3 DeG. J. S. 342
24 Ch. D. 122

A testator bequeathed leasehold property specifically. Some years after his death, and after the death intestate of his executor, the property was taken by the Corporation of *Liverpool* under powers conferred by an Act with which the *Lands Clauses Consolidation Act* was incorporated. The corporation required that letters of administration of the testator's estate should be taken out. This was done, and a conveyance taken from the administrator:—

Held, that the corporation were bound, under sect. 82 of the *Lands Clauses Consolidation Act*, to pay the costs of taking out administration.

In re South Wales Railway Company (1) overruled.

ROBERT EDGAR, being entitled to two leasehold houses in *Liverpool*, by his will, dated the 24th of July, 1846, bequeathed one of them to his daughter for her life, with remainder to her children as she should appoint; and the other to his son for life (subject to the performance of certain conditions by him) with remainder to the children of the testator and his son equally; and he appointed his daughter and her husband executrix and executor of his will. The testator died shortly after the date of the will, and in or before the year 1865 the daughter and her husband both died intestate. The son was still living. In the year 1866, the Corporation of *Liverpool*, under the powers of the *Liverpool Improvement Act* (with which the *Lands Clauses Consolidation Act* was incorporated) took both the houses for the purposes of the Act; and in order to acquire a good title they required that administration *de bonis non* should be taken out to *Robert Edgar*. This was accordingly done, and the property conveyed to the corporation by the administrator under the powers conferred by the *Lands Clauses Consolidation Act*.

An order was subsequently made for the taxation of the costs of the conveyance. The question was raised whether the corporation were bound to pay the costs of taking out administration; and this was now brought before the Court upon an adjourned summons.

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(1) 14 Beav. 418.

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It was deposed that the administration was taken out upon the requisition of the solicitors of the corporation, and solely with a view to making the conveyance: and no probate duty was paid in respect thereof.

Mr. *Jessel*, Q.C., for the corporation, contended that the costs of taking out administration were not costs of "deducing, verifying, or evidencing" title to lands, or "incident to the investigation, deduction, or verification of such title," within the meaning of the 82nd section of the *Lands Clauses Consolidation Act*: and cited *In re South Wales Railway Company* (1).

Mr. *Baggallay*, Q.C., for the administrator.

Mar. 9. LORD ROMILLY, M.R.:—

Upon consideration, I have come to the conclusion that the case of *In re South Wales Railway Company* was wrongly decided; I therefore overrule that decision, which, I believe, stands alone. I say this with regret, for I fear that I may have induced persons to follow the opinion then expressed without discussion, and by this means may have done injustice in that and other cases, but I think that the corporation must pay the costs of taking out administration.

Solicitors: Messrs. *Torr, Janeway, & Tagart*; Mr. *Thomas Kennedy*.

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(1) 14 Beav. 418.

M. R.
1868
March 14.

In re BREECH-LOADING ARMOURY COMPANY.

WRAGGE'S CASE.

Notice—Priority—Assignment of Chose in Action—Bankruptcy of Assignor—Order and Disposition—Debt of Company—Notice to Official Liquidator.

Notice to an official liquidator of the assignment of a debt due from the company is sufficient to perfect the assignment, and upon the subsequent bankruptcy of the assignor the debt does not vest in his assignee in bankruptcy as being in his order and disposition.

THIS was an application by the assignee in bankruptcy of *A. W. Wragge,* a creditor of the *Breech-loading Armoury Company, Limited,* now being wound up by the Court, that his name, as such assignee, might be entered upon the list of creditors of the company instead of the name of *Wragge.*

The company was ordered to be wound up in 1866; *Wragge's* debt was admitted, and he was placed on the list of creditors and received a dividend on it in August, 1867. On the 8th of November, 1867, he assigned the debt to *Robert Wood,* and on the 25th of November notice of the assignment was given to the official liquidator. On the 4th of January, 1868, *Wragge* was adjudicated a bankrupt. *Wood* had been examined in the Court of Bankruptcy, and had admitted that he had not advanced any money to *Wragge,* and had not known of the assignment until some time in January, 1868.

Mr. *Graham Hastings,* for the applicant:—

The notice to the official liquidator of the assignment was not sufficient to take the debt out of the order and disposition of the bankrupt. *Wood,* in order to complete his title, should have applied to have his name placed on the list of creditors. As the company is being wound up by the Court, the case is analogous to that of a fund in Court, an assignee of which must obtain a stop order to perfect his assignment. It will add greatly to the trouble and responsibility of official liquidators, if they are bound to accept such notices, which they have no means of placing upon the file of proceedings.

But if the Court is of opinion that the assignment was perfected by the notice, there should be further inquiry as to the validity of the assignment.

Wood had been served with notice of the application, but did not appear.

LORD ROMILLY, M.R.:—

I am of opinion that an assignee of a debt due from a company in course of winding up, by giving notice to the official liquidator, does all that is necessary to complete his title, and to take the debt out of the order and disposition of the assignor. It is said that *Wood* might have applied to have his name substituted for that of the assignor on the list of creditors, but if he had made such an application, and used the utmost diligence, the assignor might have become bankrupt before the application could be heard; and a mortgagee, or a person having a charge on the debt, to whom the same rule on the subject of notice must apply as to an assignee of the entire debt, could not have his name so substituted. When the estate of a bankrupt is being wound up by the Court of Bankruptcy, notice to the assignee in bankruptcy of an assignment of a debt due from the bankrupt's estate is sufficient to perfect the assignment of the debt, and the official liquidator is in the same position for this purpose as an assignee in bankruptcy. The evidence, however, is sufficient to raise a suspicion of the *bona fides* of the assignment, and I will allow the application to stand over with a view to further investigation.

Solicitor for the Applicant: Mr. *W. A. Day.*

M. R.
1868
Feb. 8, 10.

7 Eq. 557.
9 Ch. D. 324
325; 7

In re MASONS' HALL TAVERN COMPANY.

HABERSHON'S CASE.

Company—Director—Call—Set off of Debt payable in futuro *against Call.*

The directors of a joint stock company redeemed at a discount a debenture of the company held by *H.*, a director, two years before it was payable, and allowed *H.* to set off the redemption money against a call then due on his shares. Two months afterwards the company was ordered to be wound up by the Court:—

Held, that the set-off could not be allowed, and that *H.* remained liable to pay the call.

THIS was an application by the official liquidator of the *Masons' Hall Tavern Company, Limited*, to place the name of *Edward Habershon* on the list of contributories in respect of 100 shares. The company was registered as a limited company under the *Companies Act*, 1862, on the 12th of October, 1865, with a nominal capital of £50,000 in 5000 shares of £10 each. *Habershon* was one of the original directors of the company, and was the registered holder of 100 shares, upon which he paid £5 per share before 1867. In January, 1867, a call was made of the remaining £5 per share, payable on the 4th of March. On the 25th of March, *Habershon*, who had a claim against the company for £468 11*s.* for his fees as architect, and for £25 interest on £1000 lent by him to the company, and also held debentures of the company to the amount of £1500, payable in June, 1869, upon which £45 was due for interest, wrote to the secretary the following letter:—

"In reply to the call of £500, being the balance unpaid on my shares, I beg to refer you to the following—my account against the company, which has been sent in to them—£468 11s.—the interest due in December last from coupons attached to my debentures, and which the directors decided should be set against calls, £45—interest on the last renewal of bill for £1000, as arranged, £25—making a total as follows:—

Account	£468	11	0
Coupons	45	0	0
Interest	25	0	0
	£538	11	0

"We will make this £500, the amount of the call, by reducing the account to £430.

"Please see the call is properly entered."

On the 2nd of April, 1867, a directors' meeting was held, at which *Habershon* was present, and the minutes contained the following entry:—

"Mr. *Habershon* proposed to accept £332 10*s.* in discharge of his firm's account of fees and charges against the company, amounting to £468 11*s.*, on condition of the company redeeming a debenture held by him for £100 at a discount of 2½ per cent., and paying £45 overdue interest on debentures, and £25 interest on the renewal by Mr. *Habershon* of the company's £1000 acceptance due 18th December last.

"Resolved, that this proposal be accepted, and a cheque drawn for £500 thus:—

In discharge of fees . . .	£332	10	0
Interest on debentures . . .	45	0	0
Interest on renewed acceptance .	25	0	0
Redemption of debenture . .	97	10	0
	£500	0	0."

The cheque for £500 was accordingly drawn, and paid to *Habershon* on the same day. On the 16th of April he paid to the company's bankers £500 in discharge of the call on his shares, and received a receipt in the regular form for the call. On the 1st of May the directors passed a resolution to present a petition to wind up the company, and on the 1st of June the winding-up order was made. The official liquidator, in his affidavit in support of the application, stated that on the 2nd of April, 1867, the company would have been wholly insolvent, after crediting it with the full value of all its assets and effects, and with the full amount of the call of £5 per share; but there was not sufficient evidence, in the opinion of the Court, to shew that the directors on that day knew of its insolvency. The official liquidator also sought to impeach the validity of the debentures held by *Habershon* on various grounds, which it is unnecessary to state for the purpose of this report.

Mr. *Jessel*, Q.C., and Mr. *Eddis*, for the official liquidator:—

The question is, whether the Respondent has paid up the full amount of his shares. It is clear from the letter of the 25th of March, and the minutes of the meeting of the 2nd of April, 1867, that the £5 call on these shares was really paid only by setting off the sums mentioned in the resolution of the directors; unless, therefore, those sums could then properly have been paid to *Habershon* the call has not been paid. But at that time the company was hopelessly insolvent, and the payment, under those circumstances, of the debts of the company to a director, who was himself present and assisted in passing the resolution, was an act of fraudulent preference, and invalid under the 164th section of the *Companies Act*, 1862. And this applies still more strongly to the redemption of the debenture, which was not then due. [They also contended that the debenture was void.]

Mr. *Southgate*, Q.C., and Mr. *Streeten*, for *Habershon*:—

The payment of £500 to *Habershon* on the 2nd of April, and his payment of the call a fortnight afterwards, were distinct transactions. The resolution of the directors did not mention the call, and although *Habershon* had in his letter proposed a set-off, the terms of the resolution were quite different from that proposal. The shares, therefore, having been fully paid up, *Habershon* cannot be made a contributory; and the official liquidator, if he seeks to impeach the payments made to *Habershon*, must apply under the 165th section of the Act to charge him with the money which he has received from the company. But these payments were perfectly good; although it now turns out that the company was in insolvent circumstances, it has not been proved that the directors knew this, or that they made these payments with the intention of defrauding the creditors of the company. There was no reason why they should not redeem a debenture payable at a future time, especially when they thereby obtained a considerable reduction of *Habershon's* bill for fees.

Mr. *Jessel*, in reply.

Feb. 10. LORD ROMILLY, M.R. :—

I am of opinion that the payment of £500 by Mr. *Habershon* to the company on the 16th of April, 1867, cannot be considered a full discharge of the call of £5 per share on his 100 shares. His letter of the 25th of March, and the minute of the directors' meeting on the 2nd of April, clearly shew that there was an arrangement between him and the directors that he should set off his call against what he claimed from the company, as stated in the minutes; and whether the two cheques were paid on the same day, or with the interval of a fortnight, makes no difference in the substance of the transaction. Now, Mr. *Habershon* was a director of the company, and in order to justify the setting off against his calls of money due to him from the company, it must be shewn that the money so set off was actually due; but part of the money set off in this case was a debt upon a debenture which was not payable until 1869, which was redeemed at a discount of 2½ per cent.; and I am of opinion that that could not be set off against the call.

With regard to the other sums of money set off against the call, the question depends upon whether the transaction took place in contemplation of the insolvency of the company. It is now proved that the company was insolvent, but this took place a month before the resolution to present a winding-up Petition, and I am not satisfied, upon the evidence, that the directors intended to make these payments by way of fraudulent preference.

I shall, therefore, put Mr. *Habershon* on the list of contributories in respect of 100 shares "paid in part." I have stated my opinion, upon the evidence now before me, that the £97 10*s*. was the only part of the set-off which was improper, but that will be no part of the order. The costs of both parties must come out of the estate.

Solicitors for the Official Liquidator: Messrs. *Mercer & Mercer*.
Solicitor for the Respondent: Mr. *Greenwood*.

M. R.
1868
March 14.

BOYD *v.* PETRIE.

Practice—Documents—Inspection by Witnesses.

A Plaintiff suing as transferee of a mortgage ordered, before decree, to produce for the inspection of the Defendants' witnesses, before making their affidavits, his transfer deed, the validity, but not the genuineness, of which was denied by the answer, but which the Defendants' solicitor suspected to be forged.

Revd by L.JJ. 3Ch 818

THIS was an application by *Mary Thellusson* and *Sophia Grant*, two of the Defendants, that certain deeds of lease and release of the 1st and 2nd of February, 1830, in the possession of the Plaintiffs, might be produced to the applicants, their solicitors and agents, "and such witnesses on their behalf as they might require to see them prior to and at the time of making their affidavits on behalf of the said Defendants in this cause."

The Plaintiffs claimed to be the transferees of several mortgages of an estate in *Norfolk*, and the object of the suit was to realize their securities by sale or foreclosure. One of these mortgages was originally made to the Defendant *Sophia Grant*, and another to *Jane Grant*, of whom the Defendant *Mary Thellusson* was the administratrix, and the deeds in question purported to transfer these two mortgages from *Sophia* and *Jane Grant* to a person through whom the Plaintiffs claimed, and on the deed of release were indorsed receipts for the mortgage debts, purporting to be signed by *Sophia* and *Jane Grant* respectively. *Sophia Grant*, by her answer, stated that she did not know whether or not she had ever executed any such deeds, but that, if she executed them, she did so at the instance of her brother, the mortgagor, in ignorance of their contents, nature, and effect, and without receiving any consideration, and without any professional advice, and that no part of the mortgage debt was ever paid to her. *Mary Thellusson's* answer was to the same effect, speaking as to her belief only, with reference to *Jane Grant's* mortgage. Both Defendants, by their answers, insisted that the deeds were inoperative.

In support of the application the solicitor of the Defendants, who had inspected the deeds, made an affidavit, stating that he was advised, and believed, that it was most material and necessary on behalf of the Defendants that the deeds should be produced to certain persons other than the Defendants and their solicitor, for the purpose of such persons inspecting and seeing certain particulars and marks appearing on such deeds prior to giving evidence as to such particulars and marks, which he was advised, and believed, would have an important and material bearing in support of the Defendants' contention in this cause, that such deeds as against them were invalid; that the mere production and ordinary proof of such deeds would not put in evidence the matters aforesaid; that such matters did not relate to the contents or construction of the deed; and that, without such production and inspection, the said persons could not give evidence as to such matters, and he could not obtain instructions from them for their affidavits.

Mr. *Phear*, for the applicants:—

The appearance of the deeds leads the solicitor to suspect their genuineness, and it is impossible for the applicants to procure evidence on that question without submitting the deeds to experts. A similar order was made in *Groves* v. *Groves* (1), where an alleged creditor, coming in under the decree in an administration suit, rested his claim on documents which the Plaintiff suspected to be forged. It will be said that the issue of the genuineness of the deeds is not raised by the pleadings, but the Court will not put the applicants to the circuitous process of filing a supplemental answer or a cross-bill for the purpose of raising this issue, in order to get the production of the documents.

Mr. *Jessel*, Q.C., *amicus curiæ*, stated that a similar order was made after decree in *Mayes* v. *Mayes* (2).

The Master of the Rolls:—I think I made a similar order in *Cresswell* v. *Jackson* (3) before decree.

Mr. *Parke*, for the Plaintiffs:—

There is no reported authority for such an order being made before decree, and it is submitted that the Court will not extend

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(1) Kay, App. xix.

(2) M. R., 1865, unreported on this point. 14 Jur. N.S. 635

(3) Unreported. 14 W.R. 169.

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the practice of compelling a party to disclose his documents to persons who, after inspecting them, may not be called upon to give evidence. If a party or his solicitor, by merely suggesting that he suspects a document in his adversary's possession not to be genuine, may procure the inspection of that document by any number of persons, it may lead to very great abuses. The distinction between the production of documents before and after decree is illustrated by the case of co-Defendants: *Hart* v. *Montefiore* (1). In *Swansea Vale Railway Company* v. *Budd* (2) the Vice-Chancellor ordered the production of plans to the Defendant's surveyor, on the ground that they would be unintelligible to an unskilled person, but he distinguished the case from one in which the documents were alleged to be forged. In this case there is no allegation in the pleadings that the deeds are not genuine, and the solicitor's affidavit is of the vaguest description.

LORD ROMILLY, M.R. :—

I think I ought to make the same order as was made in *Groves* v. *Groves* (3). There the person who was ordered to produce the documents was a creditor propounding a claim under the decree, and such a claimant is in very much the same position as a Plaintiff in a suit. It is true that the issue as to the genuineness of these deeds is not distinctly raised by the answer, but I do not think I need require the Defendants to file a supplemental answer, or to file a bill impeaching the genuineness of the documents.

Solicitor for the Applicants: Mr. *T. Gill, Jun.*
Solicitors for the Plaintiffs: Messrs. *Parke & Pollock.*

(1) 30 Beav. 280; 8 Jur N S 350 (2) Law Rep. 2 Eq. 274. 12 Jur N
(3) Kay, App. xix.

SHEPHERD *v.* GILLESPIE.

V.-C. S.
1867
Nov. 24, 25;
Dec. 4.

Sale of Shares—Passing another Person's Name as Transferee—Conduct and Liability of third Party—Specific Performance—Indemnity—Companies Act, 1862, *s.* 35—*Form of Decree.*

On the instructions of *W.* shares in a company, subsequently wound up, were purchased for him by a broker, who, on the settling-day, also on the instructions of *W.*, gave the name of *G.* as the purchaser, and the deeds of transfer were made out in *G.*'s name and delivered to him for execution, and he, for some time, retained possession of and dealt with them. *W.* informed *G.* that he had passed his name as transferee, and had also passed a cheque on the company's bankers for the purchase-money to the debit of his firm. *G.* took no step to inform the vendor that he did not assent to the contract, though he did express his dissent to *W.*:—

Held, that the vendor was entitled to a decree for specific performance against *G.*

Form of decree.

Quære, whether the 35th section of the *Companies Act*, 1862, does not apply to a case of delay on the part of a transferee in procuring registration.

Shepherd's Case (1) discussed.

3 Ch 390
6 Eq 163.
L 508
847. 853,
4 Ch 6, 8,
7 Ch 747
9 Ch 421 n

Affd by L.JJ. 3 Ch. 764.

*J*AMES SHEPHERD, the Plaintiff, a stock and share broker in the *City*, being possessed of 250 shares in the *Joint Stock Discount Company, Limited*, and his name being on the register of members of the company, on the 27th of December, 1865, entered into a contract with a Mr. *Lloyd*, of the *Stock Exchange*, acting as agent and broker, for the sale to him of 200 of the shares, for the sum of £1750, and of the remaining 50 for £437 10*s.*

On the 15th of January, 1866, *Lloyd* paid those sums to the Plaintiff, and informed him that his principal or constituent was the Defendant, *James Freeling Wilkinson* (who was the managing director of the company), but that by his direction the transfers were to be made out, not to him, but to the Defendant *Gillespie* (a director of the company), who was to be treated as the purchaser; and in pursuance of a request to that effect two deeds of transfer, duly executed by the Plaintiff in the form prescribed by the articles of association, were, on the 16th of January, made to the Defendant *Gillespie*, and delivered to *Lloyd* as the agent of the Defendants. The deeds of transfer were handed over to the Defendant *Gillespie* for execution by him. He did not execute the transfers, but took and retained possession of them until after the 17th of March, 1866, on which day an order was made for winding up the company, when he handed them over to the secretary of the company. On the other side it was stated that he deposited them as security for the purchase-money standing to his debit.

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(1) Law Rep. 2 Ch. 16; 12 Jur N.S. 897

Numerous applications were made to both Defendants requiring them to complete the contract, and for that purpose to procure registration of the deeds of transfer; but both refused to do so. The bill, filed after the winding-up order, charged that the Defendant *Gillespie*, for several weeks after he received the deeds of transfer, by his conduct and acquiescence caused the Plaintiff to believe that he had no objection to such deeds, and that the same would be registered; that the Defendant *Wilkinson* ought to be ordered to procure the execution and registration of the deeds, and that the Defendant *Gillespie* ought to be ordered to execute the same as such transferee, and that both were bound to procure the registration thereof, or the rectification of the register by inserting therein the name of the Defendant *Gillespie* in lieu of that of the Plaintiff.

The Plaintiff prayed for specific performance against both the Defendants, and that they might be decreed to procure the shares to be registered in the name of the Defendant *Gillespie;* that both or one of them might be ordered to pay any calls, and to indemnify the Plaintiff against all calls, losses, damages, and costs by reason of the non-completion of the contract.

The Defendant *Wilkinson* admitted that *Lloyd* bought the shares as his broker and agent, and upon his instructions and order; but he alleged, that before the next settling day on the *Stock Exchange* the Defendant *Gillespie* agreed to adopt the contract and to become the purchaser and transferee, and that his name was, with his consent and by his direction, given by *Lloyd* to the Plaintiff as the actual purchaser and transferee; further, that the purchase-money was paid by or on account of the Defendant *Gillespie*, and that, as between them, *Gillespie* ought to be deemed the proper purchaser and transferee of all the shares.

The Defendant *Gillespie*, by his answer, stated that about the middle of January, 1866, *Wilkinson* informed him "that he had taken the liberty, as an old friend, of passing my name as transferee of some shares in the *Joint Stock Discount Company, Limited*, which he said had been purchased by or for his late son, and I replied that I had quite enough shares in the said company in my name already, and objected to my name being used in the way proposed, or in any other way;" further, "I was not aware that my name had been used in the matter, until I was informed thereof by the Defendant *Wilkinson* at the time and in the manner aforesaid;" and he also stated that *Wilkinson* delivered to him the deeds of transfer executed by the Plaintiff, and that *Wilkinson* informed him that he had passed a cheque on the company's bankers for the amount of the purchase-money to the debit of his, *Gillespie's*, firm, but that he told *Wilkinson* that such a thing could not be allowed, and that he should continue to object to being mixed up in the transaction.

It was in evidence that *Gillespie* had deposited the transfer as security for the purchase-money debited to him.

Mr. *Bacon*, Q.C., and Mr. *J. N. Higgins*, for the Plaintiff, after stating the facts and the evidence, submitted that this case came within the rule of law laid down in *Pickard* v. *Sears* (1), "that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." [They also cited *Duchess of Kingston's Case* (2).]

Mr. *Greene*, Q.C., and Mr. *Smart*, for the Defendant *Gillespie*, contended that his name had been used without his authority; that the money paid to the Plaintiff was not *Gillespie's*, but the company's, and that *Wilkinson*, and not *Gillespie*, was liable for what had been done by *Wilkinson*. [They referred to *Shepherd's Case* (3).]

(1) 6 Ad. & E. 469, 474.
(2) 2 Sm. L. C. 6th Ed. p. 769.
(3) Law Rep. 2 Ch. 16.

12 Jan R S d 97

Mr. *Prendergast*, Q.C., and Mr. *Vaughan Hawkins*, for the Defendant *Wilkinson*, were not called upon.

Dec. 4. SIR JOHN STUART, V.C.:—

In the register of shareholders of the *Joint Stock Discount Company* the name of the Plaintiff still stands as the owner of 250 shares; but these shares were sold by him through a broker before the 15th of January, 1866, to a purchaser, and the person dealt with as broker to the purchaser was Mr. *Lloyd*.

According to the usage on the *Stock Exchange* the name of the purchaser was not disclosed to the Plaintiff till the next settling-day—the 15th of January, 1866. On that day the Plaintiff was to receive the purchase-money, and execute the deeds of transfer to the purchaser, whose name he would then ascertain from Mr. *Lloyd*. Accordingly on that day Mr. *Lloyd* gave the name of the Defendant *Gillespie* as the purchaser, and paid to the Plaintiff the price of the shares as the consideration for the execution by him of the deeds which transferred the shares to the Defendant *Gillespie*. On that transaction, so far as the Plaintiff was concerned, the evidence discloses nothing to shew that any contract had been made by the Plaintiff with any person but the Defendant *Gillespie*, on whose behalf Mr. *Lloyd* professed to pay the purchase-money, and to whom, as purchaser, the Plaintiff was required to execute, and did execute, the deeds of transfer.

The Defendant *Gillespie*, however, maintains that not he but the Defendant *Wilkinson* was the real purchaser. The question now to be decided is, whether on the transactions between the Defendants *Gillespie* and *Wilkinson*, the Defendant *Gillespie* can get rid of the effect of the deeds of transfer to him.

It appears that the Defendant *Wilkinson* had instructed Mr. *Lloyd*, as his broker, to purchase the shares some time before the 15th of January. That in or about the middle of January *Wilkinson* informed the Defendant *Gillespie*, according to the language in *Gillespie's* answer, of what he had done:—[His Honour referred to the evidence of the Defendant *Gillespie* above set forth.] However, the Defendant *Gillespie* retained the shares, and never altered the debit of the purchase-money to his firm. What is material to be considered in this case is, whether there was such a sufficient assent to the contract by *Gillespie* as binds him in equity. It is essential to the right to enforce a contract that there should be sufficient testimony of the assent of the contracting parties. An assent which is to be implied from conduct may be as binding as an express assent. Where a man who has a title, and knows of it, stands by and either encourages or does not forbid the purchase, he shall be bound, and all claiming under him. It is in these words that the doctrine of implied assent is illustrated in the Treatise of Equity edited by *Fonblanque* (1). *Gillespie* was fully aware that the Plaintiff had conveyed the shares to him in consideration of moneys supplied on the credit of his firm, and was therefore aware that the Plaintiff looked to him as liable for the performance of any further act necessary for the completion. It was argued that the broker was not employed by *Gillespie*, but by *Wilkinson.* There is nothing to shew that *Wilkinson's* name was ever mentioned to the Plaintiff as the purchaser: nor can the rights of the Plaintiff be in any way affected by conversations or transactions between *Wilkinson* and *Gillespie* of which he had no notice.

A contract for sale so far completed as that the vendor had executed the conveyance and received the purchase-money, could only be annulled or altered by the contracting parties.

The utmost that *Gillespie* did, according to his own account, was to express his dissent to *Wilkinson.* If he had really dissented, and wished to annul the transaction, he was bound immediately to communicate with the Plaintiff, and to execute a re-transfer. Instead of that he stood by, knowing that the Plaintiff considered him as the purchaser, and looked to him for the completion of the contract. He took no step whatever to inform the Plaintiff that he did not assent to the contract, and wished to get rid of it; if, indeed, it were the fact that he did not expressly assent. His conduct amounted to that which is necessary to bind him by an implied assent. But there is a direct conflict on the evidence as to an express assent. According to the evidence of *Wilkinson* there was an express consent by *Gillespie* to the purchase. The want of any immediate communication from the Defendant *Gillespie* to the Plaintiff seems to add weight to the evidence of *Wilkinson.* But

(1) Vol. i. p. 163.

the case cannot be decided on the conflicting testimony of the two co-Defendants as to what passed between them. What is conclusive against the case made by *Gillespie* is, that he not only had the deeds of transfer delivered to him, but kept them, and finally deposited them as a security for the purchase-money debited to his firm, for which he was liable. The primary right of the Plaintiff against *Gillespie* is, therefore, satisfactorily established. *Gillespie's* letters to the Plaintiff previous to the suit justified the Plaintiff in making *Wilkinson* a party. The Plaintiff must pay the costs of *Wilkinson*, and recover them, together with his own costs, against *Gillespie.*

Perhaps it is proper to notice *Shepherd's Case* (1), which was referred to during the argument.

That case seems to have no application to the present, except that, according to the view expressed by one of the Lords Justices, it apparently sanctions the right of the Plaintiff to relief against the Defendant *Gillespie*, inasmuch as he suggested that the proper remedy was against the transferee. The case seems to have been decided on the construction of the words of the 35th section of the Act of 1862, which refer to "default made in entering on the register." If it had not been that the Court of Appeal decided on that view of the question, and that no argument was addressed to the Court as to the construction of the words of the section which refer to the case of unnecessary delay, it seems doubtful whether, on the true contruction, unnecessary delay on the part of the transferee does not give the right to have the register rectified. That question seems not to have been argued or decided. If it should ever be raised, it may be found difficult not to hold that the 35th section was intended rather to give relief in the case of unnecessary delay on the part of the transferee than on the part of directors, although unnecessary delay on the part of the directors seems within the scope of the enactment.

16 WR, 228

March 2, 1868. MINUTES:—Declare that the Defendant *John Gillespie*, by virtue of the sale and transfer to him in the pleadings mentioned, became and was, and ought to be deemed and treated as, the owner and holder of the 250 shares in the *Joint Stock Discount Company, Limited*, in the pleadings mentioned, as from the 27th day of December, 1865, the date of the agreement for the purchase thereof in the pleadings mentioned, and the Plaintiff is to be at liberty to make such application in the winding up of the said company as he may be advised for the purpose of rectifying the register of the shareholders of the said company.

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(1) Law Rep. 2 Ch. 16. 12 Jur. N.S. 97

Order and decree that the said Defendant do pay to the Plaintiff on or before the day of , 1868, the amount of all sums which have been properly paid by the Plaintiff in respect of calls made upon the said 250 shares since the 27th day of December, 1865, together with interest at the rate of £5 per cent. per annum from the date when such sums respectively were paid by the Plaintiff, or on account of the Plaintiff, due down to the date of the payment, and the amount of such sums and interest to be verified by affidavit.

Declare that the Defendant is also liable to pay to the Plaintiff the amount of all calls, if any, which have been made on the said 250 shares since the 27th day of December, 1865, but which have not been paid by the Plaintiff, together with all interest which shall be due to the official liquidator of the said company in respect of such last-mentioned calls at the date of the account hereinafter directed, the Plaintiff undertaking to pay such amount and interest to the said official liquidator.

Declare that the said Defendant is bound to indemnify the Plaintiff against all calls which may hereafter be made on the said 250 shares, and all interest thereon, and against all liabilities and loss which the Plaintiff has incurred since the said 27th day of December, 1865, or may hereafter incur in respect of the said 250 shares, and against all liability, loss, costs, damages, and expenses, which the Plaintiff has incurred or may hereafter incur by reason of his being settled on the list of contributories of the *Joint Stock Discount Company, Limited*, in respect of such 250 shares.

And let the Plaintiff in all things relating to the said 250 shares act at the expense of the said Defendant, as the said Defendant shall reasonably direct, and as if the said Plaintiff were trustee of the said Defendant for the same shares.

Refer it to the Taxing Master to tax the costs of the Defendant *J. F. Wilkinson* of this suit, and let the Plaintiff pay to the said Defendant the amount of his said costs when so taxed.

Refer it to the Taxing Master to tax the costs of the Plaintiff of this suit, including therein any costs he may have been put to in respect of his being settled on the list of contributories of the *Joint Stock Discount Company, Limited*, in respect of such 250 shares, and let what the Plaintiff shall pay for the costs of the Defendant *J. F. Wilkinson* be added to his own costs when so taxed, and let the Taxing Master certify the total amount thereof, and let the Defendant *J. Gillespie* pay to the Plaintiff the amount so to be certified.

Let an account be taken of what, having regard to the declarations aforesaid, is due to the Plaintiff for principal and interest in respect of the aforesaid calls, and let the Defendant *J. Gillespie* within fourteen days after service upon him of this decree, and the certificate of the Chief Clerk to be made in pursuance thereof, pay to the Plaintiff what shall be so found due to him as aforesaid for such principal and interest.

Liberty to the Plaintiff to apply to the Judge at Chambers, as he may be

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advised, for such order or orders as may be necessary for the purpose of giving effect to the indemnity, the right to which is hereinbefore declared, and for enabling him, his heirs, executors, or administrators, and his and their estate and effects, to have a good and effectual indemnity in respect of the said 250 shares, and from and against all calls which may hereafter be made on the said 250 shares, and all interest thereon, and against all liability, loss, costs; damages, and expenses and other consequence which the Plaintiff, his heirs, executors, or administrators, has incurred or may incur by or in consequence of his having been settled on the list of contributories of the said company in respect of the said 250 shares.

Liberty to apply generally.

Solicitors for the Plaintiff: Messrs. *Lewis, Munns, Nunn, & Longden.*

Solicitors for Mr. *Gillespie:* Messrs. *W. & H. P. Sharp.*

Solicitor for Mr. *Wilkinson:* Mr. *H. F. Holt.*

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1868
Jan. 31.

In re UNITED ENGLISH AND SCOTTISH LIFE INSURANCE COMPANY.

Judgment at Law against Company—Garnishee, Action against—Winding up of Company—Companies Act, 1862, *s.* 163—*Injunction.*

3 Ch 708

H. recovered judgment against a company, and afterwards obtained a garnishee order against *S.*, an alleged debtor to the company, who subsequently denied that he was indebted to the company. *H.* then, by leave, brought an action against *S.*, and pending the proceedings the company was ordered to be wound up, and a liquidator was appointed.

A motion by the liquidator for an injunction to restrain the proceedings at law was refused, but it was ordered that in case *H.* should recover a verdict he should not put in force any execution against the estate of the company in the hands of *S.*

IN 1866 the *United English and Scottish Life Insurance Company, Limited,* was established under the *Companies Act,* 1862. *W. E. Stewart* became a director, having subscribed for fifty shares.

A. T. Hawkins, the promoter of the company, was appointed managing director. On the 28th of August, 1867, a resolution was passed to wind up the company voluntarily, but it was never confirmed by any subsequent meeting of shareholders. The persons appointed to wind up the company made, on the 4th of October, 1867, a call of £8 a share, and as *Stewart* had paid £50 on the

21st of May, 1867, in advance of calls, he received a notice to pay £350. Under an arrangement with the directors *Hawkins* received bonds of the company for £1300, bearing interest payable half-yearly. The interest was not paid, and on the 26th of November, 1867, *Hawkins*, in an action against the company, recovered judgment for £1334 14*s.* 9*d.* and £6 2*s.* costs; and on the 28th of November Mr. Justice *Shee* made an order attaching debts due and growing due from *Stewart*, as garnishee, to the company, to answer the judgment, and also ordered *Stewart* to attend before him on the 5th of December to shew cause why he should not pay the judgment creditor the debt due.

On the 5th of December *Stewart's* attorney attended and denied that any debt was due from him to the company, upon the ground that the call alleged to be due from *Stewart* to the company had not been duly made, and thereupon Mr. Justice *Lush* ordered that *Hawkins* should be at liberty to proceed against *Stewart*, and consequently on the 6th of December a writ was issued by *Hawkins* in an action against *Stewart*, requiring him to shew cause why execution should not be issued for the £350, being the amount of a debt due from him to the company towards satisfying the £1340 16*s.* 9*d.*, and a further sum of £2 15*s.* for costs of suit, and he having appeared, a declaration was, on the 1st of January, 1868, served, stating that the debt was due from *Stewart* to the company for a call made on the 4th of October, 1867; that the money was payable on the 1st of November, 1867; and that an action had accrued to the company for the £350.

On the 2nd of January, 1868, *Stewart* presented a Petition at the Rolls for winding-up the company.

On the 15th of January *Stewart* pleaded in the action "never indebted," and thereupon issue was joined and notice given of trial for the 23rd of January.

On the 18th of January the Master of the Rolls made a compulsory order for winding up the company, and *Stewart* had the carriage of it.

On the 23rd of January *Stewart* moved for an injunction to restrain the proceedings at law, but the motion was refused. An official liquidator having been appointed, this was a motion on his part to restrain *Hawkins* from further proceeding in the action

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against *Stewart*, a shareholder in the company, in respect to the sums unpaid upon his shares as a garnishee in respect of the judgment.

Mr. *Bacon*, Q.C., and Mr. *Ludlow*, for the motion, submitted that under the provisions of the 163rd section of the *Companies Act*, 1862, the liquidator was entitled to an injunction.

Mr. *W. Pearson* (Mr. *Greene*, Q.C., with him) for *Hawkins*:—

The right of *Hawkins* was perfected on the 26th of November by the judgment which was recovered, and the order made on the 28th of November under the provisions of the *Common Law Procedure Act*, 1852, attached the call in *Stewart's* hands to answer the debt due to *Hawkins*, and also required *Stewart* to shew cause why he should not pay the debt. *Stewart* appeared upon that order and denied that he was liable as garnishee, and thereupon *Hawkins* had leave to proceed against *Stewart* for the purpose of testing the truth of his statement. This motion, though in the name of the liquidator, is by *Stewart* virtually, to prevent the question—whether he had moneys of the company in his hands when the first order was made—being tried at law. If he had, they became *Hawkins*' moneys. If in the action judgment should go against *Stewart*, execution will go against him personally. The 163rd section of the *Companies Act*, 1862, has nothing to do with the question, as this action is not against the company, and, therefore, the injunction ought not to be granted.

SIR JOHN STUART, V.C.:—

There is no sufficient case for restraining the action. If *Hawkins* shall obtain a verdict, there must be an injunction to restrain him from putting in force any attachment, sequestration, distress or execution against the estate or effects of the company in the hands of *Stewart*.

Solicitors for the Liquidator: Messrs. *Noon & Davies*.
Solicitors for *Hawkins*: Messrs. *Ditton & Warmington*.

In re STANDLEY'S ESTATE.

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1868
Feb. 17, 26.

Will—Construction—Illegitimate Children not designated by the Words "Next of Kin" of another illegitimate Child.

3 R. 182
6 Ch. 344
— 352
15 Eq. 306
— 373
6 H.L. 272

A testator, who had none but illegitimate children, by his will, made five months before his death, devised and bequeathed all his real and personal estate to trustees, upon trust, on the arrival of a future event, to sell the realty, and to divide the residue of the proceeds and of the personalty into four parts, and pay one to his son *J.*, and if his said son should die under twenty-one, and should not leave any child who should attain twenty-one or marry, the share was to be held in trust for such persons as would at his son's decease be his "next of kin" under the *Statute of Distributions*. Testator directed another share to be held upon certain trusts for the benefit of his daughter *A.* (a married woman), her husband, appointees, and children; and if she should leave no child or issue who should become entitled, he directed the share to be paid or assigned to such persons as would, at *A.*'s death, be her "next of kin" under the *Statute of Distributions* in case she had died intestate and unmarried. He directed the third and fourth shares to be held upon similar trusts for the benefit of his two other daughters, *H.* and *E.* respectively, then unmarried, their husbands, appointees, children, and next of kin. He then provided that any shares or moneys to which any or either of his said three daughters should become entitled "by virtue of the provisions hereinbefore contained, as next of kin of the others or other of them," or of his son, should be held upon the like trusts as the original shares.

The daughter *H.* having married, and died, without having had a child, and without having made any appointment, and her husband being also dead:—

Held, that the phrase "next of kin" of *H.* could not be read as designating the surviving illegitimate children of the testator, and that there was an intestacy as to the share of *H.*

THIS was a Petition.

William Standley, by his will, dated the 23rd of May, 1855, appointed his wife, *Martha*, and *Thomas Rathbone*, trustees, and executor and executrix thereof, and devised and bequeathed to his said trustees all his real and personal estate, upon trust to convert the residuary personalty and to invest the clear produce as therein mentioned. He declared that, subject and without prejudice to the provision thereinafter contained for making advances for the benefit of his "children," the trustees should permit the rents and income of his real and personal estate to be received by his said wife until his youngest child should attain twenty-four, if his said wife should

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so long live and continue his widow; and in case his said wife should die or marry again before such youngest child should have attained twenty-four, he directed his trustees to pay and apply the rents and produce of the real and personal estate for the maintenance of his "children," and to accumulate the residue. When and as soon as his youngest child should have attained twenty-four, he declared that his trustees should sell his real estates, and stand possessed of the proceeds thereof, and of the personalty, upon trust, if his wife should be then living, to set apart and invest so much of the money as would be sufficient to produce £200 a year, and pay the income to his wife during her life, if she should so long remain his widow; and he declared that from and after the death or second marriage of his wife the said appropriated fund should sink into his residuary personal estate; and upon trust, in the next place, to divide the clear residue of the produce of his real and personal estate into four equal parts, and to pay one of such equal fourth parts unto his son, *James Standley*, for his own use. Testator directed that in case his said son *James* should die before attaining the age of twenty-four years, and should not have any child who, being a son, should attain the age of twenty-one years, or being a daughter should attain such age or marry, and without having made any such appointment as therein mentioned, the said one-fourth share of his said son should be held in trust for such person or persons as would at the time of the decease of his said son *James* be entitled thereto as his (the son's) "next of kin under the statute for the distribution of intestates' estates, in case he had died unmarried and intestate." And as to one other equal fourth part in the said trust moneys, upon trust to invest the same in their names as therein mentioned, and to pay the annual produce of such last-mentioned part unto such person or persons as his daughter, *Ann Maria*, the wife of *Ferdinand Eglinton*, should by note in writing direct or appoint, but not so as to deprive herself of the benefit thereof by any mode of anticipation; and for want of such direction or appointment, into her own hands for her separate use, independently of her present or future husband, during her life, and after her decease then to pay the annual produce of the said part of the said trust moneys unto the present or any future husband of his said daughter, *Ann Maria*, who might survive her, during his life, for his own use; and after the decease of the survivor of his said daughter, *Ann Maria*, and her present or any future husband, to pay and transfer the said part of the said trust moneys unto, between, and amongst "the children, or child, or issue" of his said daughter, as she and her husband should as therein mentioned appoint; and in default of such appointment, among all her "children" who, being sons, should attain the age of twenty-one years, or being daughters should attain that age or marry; and the will then proceeded as follows: "And if my said daughter, *Ann Maria*, shall have no child or issue who, under the trusts aforesaid, shall become entitled to the said part or share of the said trust moneys, and the stocks, funds, and securities in or upon which the same shall be invested, the trustee or trustees for the time being of this my will shall pay or assign the part or share of the said trust moneys, and the said stocks, funds, and securities, and the dividends, interest, and annual produce thereof, unto such person or persons as my said daughter shall, notwithstanding coverture, by any deed, with or without power of revocation, or by her will, direct or appoint; and in default of such direction or appointment, to such person or persons as would at the time of the decease of my said daughter be entitled thereto as next of kin under the statute for the distribution of intestates' estates, in case she had died intestate and unmarried."

The will continued: "And concerning one other equal fourth part or share of and in the said trust moneys, upon trust, and I direct the trustees or trustee for the time being of this my will to stand possessed thereof upon and for the same or like trusts and purposes, and with, under, and subject to the same or like powers of investment, and other powers, provisions, and stipulations, for the benefit of my daughter *Harriett*, and any husband or husbands with whom she may intermarry, and her issue, appointees, and next of kin, as are hereinbefore limited, expressed, and contained with respect to the share hereinbefore given in trust for my said daughter, *Ann Maria*, and her husband or husbands, and issue, and next of kin. And as to, for, and concerning the remaining one equal fourth part or share of and in the said trust moneys, upon trust, and I direct the trustees or trustee for the time being of

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this my will to stand possessed thereof, and for the same or like trusts, intents, and purposes, and with, under, and subject to the same or like powers of investment, and other powers, provisions, and stipulations, for the benefit of my daughter *Eliza*, and any husband or husbands with whom she may intermarry, and her issue, appointees, and next of kin, as are hereinbefore limited, expressed, and contained with respect to the share hereinbefore given in trust for my said daughter, *Ann Maria*, and her husband or husbands, and issue, and next of kin: Provided always, and I do hereby expressly direct that any shares or moneys to which any or either of my said three daughters shall become entitled by virtue of the provisions hereinbefore contained, as next of kin of the others or other of them or of my said son, shall be held by the trustees or trustee for the time being of this my will upon and for the same or like trusts and purposes, and with, under, and subject to the like powers of investment, and other powers, provisions, and stipulations for the benefit of my said daughters or daughter so becoming entitled, and their husbands or husband, and their issue, appointees, and next of kin, as are hereinbefore limited, expressed, and contained, or referred to, with respect to the original shares hereinbefore given in trust for my said daughters and their husbands or husband, and issue, appointees, and next of kin."

On the 29th of July, 1855, testator's daughter *Harriett* married *Pierce Morris*.

The testator died on the 14th of October, 1855, leaving his wife and the four children above-named, surviving him; but no other child, and no issue of a deceased child.

On the 27th of December, 1855, *Harriett Morris* died under the age of twenty-one years, and without having had any issue, or having exercised the power of appointment.

On the 10th of October, 1856, testator's daughter *Eliza* married *Albert Edward Gilbert*.

On the 5th of July, 1862, testator's widow, *Martha*, married her co-trustee and co-executor, *Thomas Rathbone*.

James Standley, the youngest child of the testator, attained the age of twenty-four on the 3rd of May, 1864. In April, 1863, having previously married, he executed a settlement.

In October, 1864, *Pierce Morris*, and a mortgagee, filed a bill for administration, which was arranged; and a sum of £5900 was set apart in the names of trustees, the interest of which was paid to *Morris* during his life, under the provisions of a deed-poll dated the 12th of February, 1866, whereby the £5900 and the investments of the same were declared to be held by the trustees thereof upon the trusts and subject to the powers, provisions, and declarations, upon, with, and subject to which the one-fourth share or interest of the said testator's daughter *Harriett*, under the said will, was directed to be held or applied.

Pierce Morris died on the 28th of April, 1866. After the date of the deed-poll the trustees thereof discovered that all the children of the testator named in his will were illegitimate, and that they were born previous to his marriage with their mother; whereupon the trustees paid the £5900 and accumulations into Court.

This Petition was then presented by *Thomas Rathbone*, and *Martha* his wife, in the matter of the *Trustee Relief Act*, and of the particular account, praying that (after payment of costs) one moiety of the residue of the fund representing the £5900 and accumulations might be paid and transferred to *Thomas Rathbone*, and that the other moiety might be paid or transferred to such persons, or be dealt with in such manner, as to the Court might seem just.

From the evidence it appeared that *William* and *Martha Standley* were married on the 31st of May, 1852; and that *William Standley*, the testator, was himself illegitimate.

Mr. *Amphlett*, Q.C., and Mr. *C. M. Roupell*, for the Petitioners:—

We contend for an intestacy, in which event one moiety will go to Mrs. *Rathbone*, under the statute 1 James 2, c. 17, s. 7; the other to the Crown.

The question is, can the Court find enough to say that this will is to be construed in the same way as if the children were legitimate. We submit that it cannot.

Mr. *Wickens*, for the Crown:—

The will having been made after the marriage, the testator may have supposed that he had by marriage legitimized his children.

But whether he acted through mistake or not, there is no case where the words "next of kin" have been construed to refer to illegitimate kindred.

Mr. *Willcock*, Q.C., and Mr. *Cecil Russell*, for Mrs. *Eglinton*, Mrs. *Gilbert*, and their children:—

All the testator's children having been illegitimate, any word which he may have used importing kindred must have been intended by him to apply to the natural children. No doubt he wished to conceal that his children were illegitimate. But his meaning is plain.

The phrase "next of kin" may, in this instance, be considered a sufficient *designatio personarum*. There is nothing to prevent next of kin being designated as a class; nor to prevent a gift being good to a designated class who, by law, cannot take, otherwise a gift to the children of a man deceased who was never married could never have been held, as it frequently has, to be good in favour of his children, all of whom must necessarily be illegitimate.

Mr. *Godefroi*, for the trustees of the post-nuptial settlement of *James Standley*, supported the same construction.

Mr. *Stallard*, for the trustees of the deed-poll.

Mr. *Amphlett*, in reply.

Feb. 26. SIR W. PAGE WOOD, V.C, after stating the question, and the provisions in the will, continued:—

It appears that the events anticipated by the testator, namely, failure of children of a daughter, followed by a default of appointment by that daughter, have happened in one instance. Then, it being impossible there can be any legal next of kin of the deceased daughter, all the testator's children being illegitimate, an argument is rested on the limitation to the next of kin of the daughter, which is said to be strengthened and confirmed by the subsequent proviso. It is contended that the testator must have pointed to the surviving brother and sisters, as the persons meant by "next of kin" of the deceased daughter, otherwise there would be no one who could take under the limitation.

Now I have been very anxious to give effect, if I could possibly do so, to what appears to have been the probable intention of this testator. He seems to have thought it possible that his children, though illegitimate, could take under the description of "next of kin under the statute for the distribution of intestates' estates." But I have found it impossible to carry any such notion into effect.

The only cases in which effect has been given to a limitation in favour of illegitimate children (who, in the eye of the law, are no children at all), are cases where it can be distinctly ascertained that the testator pointed out those children as *personæ designatæ*, although he did not name them. For example, where a testator speaks of "the children of my deceased brother," and the brother never was married; in that case there could be none but illegitimate children; but as he speaks of the children as living, it is the same thing as if he had written the names of each of them in the will.

But is that test possible in this case? Is the effect of the limitation here the same as if the testator had written the names of the surviving brother and sisters into the will, in the places where he speaks of the "next of kin under the statute for the distribution of intestates' estates" of a deceased son or daughter. In the first place, it would be a very roundabout and uncouth mode of describing persons whom he had himself mentioned by name before. Independently of that, I do not think, when the whole will is carefully read, it can be supposed that that was really the thing intended. I doubt whether, when the testator spoke of the next of kin according to the statute of distributions of a deceased child, he meant merely the surviving brother and sisters. He may not have had in view the possibility of one or more having previously died leaving children; but suppose, there being one daughter dead without issue, and without having made an appointment, the son had died also without issue, and without having made any appointment, and at the time of his death the other daughters had died leaving children, is it to be conceived that the testator would have meant to exclude those children? It seems to me prepos-

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6 Eq. 150
6 Eq. 272

terous to suppose he did not mean to let in the descendants of a pre-deceased child.

What the testator has attempted to do is this, to declare that his children, though illegitimate, shall be regarded as if they were legitimate; and then, to say that under the description "next of kin" shall be let in all the persons who would have been their next of kin had they been legitimate. I apprehend that is an attempt which the law will not permit to succeed.

The case resembles that of *Shelley* v. *Bryer* (1), which I followed in *Smith* v. *Lidiard* (2), and which the Master of the Rolls followed in *Thompson* v. *Robinson* (3), in one of which a great-niece of the testator, in the other a niece of the testatrix's husband, was described as a niece, followed by a gift to all nieces, and it was held that not only could the class not be enlarged, but that even the person before described as a niece could not be admitted into the class. It appears to me here, following the language of the Master of the Rolls, that I cannot hold that the erroneous description of a person in one part of the will, will enable him to take as if he belonged to a class which is designated by the like description in another part of the same will.

Moreover, I should be avoiding giving any effect to the words "under the statute for the distribution of intestates' estates" if I were to hold that by the words "next of kin" the testator meant to point out a certain class, namely, his surviving children, only.

I must hold that the widow takes one moiety, and that the other moiety goes to the Crown.

Solicitors for the Petitioners and some of the Respondents: Messrs. *Thomas White & Sons.*

Solicitors for the Crown: Messrs. *Raven & Bradley.*

Solicitors for the Trustees of the Settlement: Messrs. *Young, Maples, Teesdale, & Nelson.*

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(1) Jac. 207.

(2) 3 K. & J. 252.

(3) 27 Beav. 486; 5 Jur NS 1196.

GOTCH *v.* FOSTER.

V.-C. W.

1868
Jan. 15;
Feb. 12.

Will—Separate Fund—Appointment of Part of the Fund—Vesting at Twenty-one—Interim Income.

Testator bequeathed £20,000 upon trust, after the decease of his daughter (a married woman), for all or such of her children as she should appoint; and in default, for all her children who should attain twenty-one, in equal shares as tenants in common. He gave powers of maintenance out of the income of the share to which any such child might be presumptively entitled; and powers of advancement to the extent of one-fourth of the portion to which any child should be presumptively entitled. The daughter, by her will, appointed the fund upon trust to raise for each of her two younger children, *F.* and *M.*, who should attain twenty-one, the sum of £2000, and subject thereto, as to the whole of the fund, to all her children who should attain twenty-one, in equal shares as tenants in common. She died leaving four children. The eldest of these having attained twenty-one:—

Held, that the child who had attained twenty-one was entitled to one-fourth of the income which had accrued since the death of her mother on the whole of the £20,000; and that she would, after payment to her of her share of capital, be entitled during the minorities of *F.* and *M.* to one-fourth of the income of the two sums of £2000 appointed to them in the event of their attaining twenty-one respectively.

THIS was a special case.

Ebenezer Foster, who died in 1851, by will, dated the 22nd of May preceding, gave and bequeathed the sum of £20,000 to his three sons upon trust to invest the same, and receive and stand possessed of the income in trust for the separate use of his daughter, *Sarah Hannah Gotch*, for her life, and after her decease to stand possessed of the trust fund upon trust "for all and every, or such one or more exclusively of the others or other" of the children of his said daughter *Sarah*, in such parts, shares, and proportions if more than one, and upon such conditions, as she should, notwithstanding coverture, by deed or will appoint; "and in default of any such direction or appointment, and so far as no such direction or appointment shall extend, and subject thereto, in trust for all and every the children and child of the said *Sarah H. Gotch* who shall attain the age of twenty-one years, in equal shares as tenants in common;" with gifts over in default of children. The

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testator then provided as follows: "It shall be lawful for the trustees or trustee for the time being of the said fund, from and after the decease of my said daughter *Sarah Hannah Gotch*, and thenceforth during the minority or respective minorities of her child or children, to pay and apply for or towards the maintenance or education, or otherwise for the benefit and advancement in the world of any such child or children respectively, the whole or such part as my said trustees or trustee for the time being shall think fit, of the interest, dividends, and annual produce of the share or respective shares to which such child or children respectively shall or may for the time being be presumptively entitled under any of the trusts hereinbefore declared of and in the said trust fund (whether the father of such child or children, if living, shall or shall not have ability to maintain and educate him, her, or them respectively), and to accumulate the surplus or residue, if any, from time to time, of the interest, dividends, and annual produce of such presumptive share for the time being of any such child under the trusts aforesaid, of or in the said trust moneys, stocks, funds, and securities, in the way of compound interest, by investing the same, and also the resulting income and produce thereof, in or upon any such stocks, funds, or securities as hereinbefore are mentioned, with such power of altering or varying securities as herein aforesaid." And the said testator declared that "such savings as last aforesaid, and the stocks, funds, and securities in or upon which the same shall be laid out or invested, and the accumulations thereof, shall be held and applied upon the same trusts, and for the same intents and purposes, as are by this my said will declared of or concerning the original fund from which the same shall have arisen or proceeded." The will then proceeded: "Provided always, and I declare, that it shall be lawful for my said trustees or trustee for the time being to apply for the maintenance and education, or otherwise for the benefit or advancement in the world of any such child or children respectively, at any time or times during the suspense of the absolute vesting of his or her expectant share for the time being of or in the said trust premises, all or any part or parts of the savings which shall have been made in any preceding year or years from the interest, dividends and annual produce of such share and the accumulations of such savings, or the stocks, funds, or securities in or upon which such savings and accumulations, or any part thereof, shall have been laid out or invested: Provided also, and I further declare, that it shall be lawful for my said trustees or trustee for the time being after the decease of my said daughter, or in her lifetime with her consent in writing, to levy and raise, and pay or apply, any part or parts, not exceeding one-fourth part, of the portion or portions to which her child or children shall or may for the time being be presumptively entitled under any of the trusts hereinbefore declared of or in the said trust moneys, stocks, funds, and securities, for or towards the advancement, marriage portion, or preferment in the world, or benefit of the same child or children respectively, in such manner as to the same trustees or trustee for the time being shall seem expedient."

Sarah H. Gotch, by her will, dated the 11th of February, 1862, after reciting the above power of appointment, in exercise of the same directed and appointed that from and after her decease the trustees of her father's will should stand possessed of the said sum of £20,000, and the stocks, funds, or securities upon which the same might be invested, and the income thereof, upon trust by and out of the same to raise and pay to "each of my children, *Francis Gotch* and *Mary Davis Gotch*, who shall attain the age of twenty-one years, and also if there shall be any child or children of mine born after the date of this my will who shall attain the age of twenty-one years, then also to raise and pay to such future-born child, if only one, or to each of such future-born children, if more than one, the sum of £2000, and, subject to the preceding trust as to all the said trust moneys, stocks, funds, and securities, and the interest, dividends, and income thereof, upon trust for all and every my children or child (as well my said four present children, as such child or children in future to be born as aforesaid), who shall attain the age of twenty-one years, in equal shares as tenants in common."

Sarah H. Gotch died on the 18th of July, 1862, leaving the four children mentioned in her will, and no more. One of these, *Alice Foster Gotch*, attained twenty-one on the 21st of December, 1866; the others were infants.

The sum of £20,000 had been raised and invested by the trustees of *Ebenezer Foster's* will, and some accumulations of income had taken place since the death of Mrs. *Gotch.*

The case was stated by *Alice Foster Gotch* as Plaintiff, against the trustees of *Ebenezer Foster's* will and her infant sisters and brother as Defendants; and the questions were:—

1. "Whether the Plaintiff is entitled to one-fourth of the income which has accrued since the death of *Sarah H. Gotch* on the whole of the sum of £20,000, or only to one-fourth of the income which has accrued since the time aforesaid on the sum of £16,000, part thereof?"

2. "Whether, in the event of the Plaintiff being entitled to one-fourth of the said income of the whole sum of £20,000, she will, after payment to her of her share of capital, be entitled during the respective minorities of *Francis Gotch* and *Mary Davis Gotch* to one-fourth of the income which will accrue upon the two sums of £2000 each, appointed to them respectively as before stated?"

Mr. *Kay*, Q.C., and Mr. *Lindley,* for the Plaintiff:—

The infants *Francis* and *Mary D. Gotch* are not entitled to any interest on these two legacies of £2000. They can claim neither past nor future interest, unless it can be shewn that the legacies vested immediately on the death of their mother.

It may be said that this case resembles those where, as in *Dundas* v. *Wolfe-Murray* (1), the particular fund which formed the subject of the gift was ordered to be severed and set apart. But there was never yet a case, even where a particular fund was ordered to be severed, in which, the claim being contingent, the mere fact of the setting apart has been held to give interest to the contingent legatee.

In this instance there is no direction in the will of Mrs. *Gotch* that these sums should be set apart at her death. The meaning of the words "raise and pay" evidently is, "raise and pay when the time for raising comes."

To support the claim for interest, it is necessary to shew that these legacies were absolutely vested. It is only in cases where it is impossible to say that the legacy is contingent, that interest has been given: *Acherley* v. *Wheeler* (1); *Boddy* v. *Dawes* (2); *Saunders* v. *Vautier* (3); *Festing* v. *Allen* (4).

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(1) 1 H. & M. 425.

[Reference was also made to *Crickett* v. *Dolby* (5).]

Mr. *Druce*, Q.C., and Mr. *Humphry*, for the Defendants:—

No doubt where a legacy is given out of residue no interest is payable. But here a fund has been expressly reserved and set apart. In such a case, a gift of principal carries interest with it. If authority be wanted for such a proposition, it is to be found in *Dundas* v. *Wolfe-Murray* (6).

This gift must be read as if it were incorporated into and formed part of the original will, together with its trusts for investment, power to vary securities, and powers of maintenance and education.

Mr. *Kay*, in reply:—

It was impossible to say beforehand how many sums of £2000 would be required. The Defendants do not venture to say that these gifts were vested. If it were necessary, which it is not, to satisfy the words "presumptively entitled" in *Ebenezer Foster's* will, they may be held to apply to the equal shares of all Mrs. *Gotch's* children.

Feb. 12. Sir W. Page Wood, V.C., after stating the questions, continued:—

Looking at the whole will of *Sarah H. Gotch*, I think the scheme was this. She simply directs that as to the two favoured children, the trustees of her father's will should stand possessed of the whole fund (£20,000) upon trust out of the same to give to each of them who shall attain twenty-one, and also to any future-born child who shall attain twenty-one, the sum of £2000. Having thus provided for the two favoured children, she gives the whole fund, subject to the preceding trust, to all her children who shall attain twenty-one.

It seems to me, therefore, as these sums are to be for the

(1) 1 P. Wms. 783.
(2) 1 Keen, 362.
(3) Cr. & Ph. 240.
(4) 5 Hare, 573; 12 M. & W. 279.
(5) 3 Ves. 10.
(6) 1 H. & M. 425.

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favoured children only if they should attain twenty-one, or for such one (if either) who should attain twenty-one, that the sums or sum, as the case may be, are or is not to be raised till the events or event shall have happened; and, subject to the raising of those sums or that sum, all the trust funds and income are to be for the benefit of all the children who shall attain twenty-one. So that although in one sense these sums of £2000 are sums to which the two favoured children are "presumptively entitled" within the language of *Ebenezer Foster's* will, yet I think the true construction of *Sarah H. Gotch's* will is, that the children are only to take when the time comes for raising their shares, and consequently that in the meantime one-fourth of the whole income belongs to the Plaintiff.

The answer, therefore, to both questions will be in the affirmative; as regards the former, in the first alternative.

The costs of both parties will come out of the accumulated fund, including the costs of the trustees as between solicitor and client.

Solicitor: Mr. *R. S. Gregson,* agent for Messrs. *Harris & Knowles, Cambridge.*

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Railway Company—Power of re-borrowing—Companies Clauses Act, ss. 39, 40.

In December, 1859, a railway company having power to borrow £60,000 by debentures had raised the whole. In October, 1864, whilst the whole of the debt was outstanding, the directors issued a debenture for £500 to *W.* In November, 1864, *Q.*, the holder of twelve debentures for £500 each, recovered judgment, and, by taking the rolling stock in execution, satisfied his debt; and in December, 1864, *K.*, the holder of five debentures for like amounts, obtained in like manner payment of four of them and part payment of the fifth. In February, 1865, the directors re-issued four debentures for £500 to *E.*, in return for his cheque for £1000, and an over-due *Lloyd's* bond for £1000. In March, 1865, they re-issued ten more debentures for £500 to *E.* for cash; and in July, 1865, they issued a debenture for £1000 to *L.* under an agreement for the hire of engines. No general meeting was held, under the 39th section of the *Companies Clauses Act*, to confirm this re-borrowing:—

Held, that the debenture issued to *W.* was void; that the debentures issued to *E.* for cash were valid, notwithstanding the want of a general

4 Ch 466-8, 474
5 Ex 114
8 CP 433-6,
5 PC 438 & 440
9 Ex 253.
16 Ch D. 435
6 QBD. 703
24 Ch D. 87.

[illegible] an action agt the direcrs who had issued the debenture & it was held that they were personally liable Weeks v Propert LR 8 CP 427
19 Ch D. 480

meeting, but that the debentures issued in exchange for the *Lloyd's* bond were good only to the extent to which the bond might be good, and that those issued under the agreement with *L.* were good only to the extent of moneys actually advanced.

FURTHER consideration.

In the month of December, 1859, the *Carmarthen and Cardigan Railway Company,* who, by their special Acts, which incorporated the *Companies Clauses Consolidation Act,* had power to borrow on debentures the sum of £60,000, had raised the whole of this amount by the issue of debentures; two of which, for £500 each, dated the 1st of October, 1859, and issued to *John Jay,* a contractor, were, on the 21st of January, 1861, transferred to the Plaintiff, *Charles Fountaine,* who, on the 1st of October, 1864, presented them for payment; but neither principal nor interest was paid.

On the 5th of October, 1864, a meeting of directors was held, pursuant to which a debenture for £500, dated the 1st of October, was issued in favour of one *William Weeks.* At this time the whole of the £60,000 was outstanding.

In October, 1864, *William Quilter,* who held twelve debentures for £500 each, issued pursuant to resolutions in 1859, brought an action against the company, and judgment having been consented to, he issued execution, under which certain plant, materials, and rolling stock belonging to the company were sold, and out of the proceeds the twelve debentures were paid off in November, 1864.

In October and December, 1864, *John Messer Knight,* the holder of five debentures of like amount, also issued in 1859, brought actions and recovered judgment, and out of the proceeds of sale under the execution in *Quilter's* action, four of these were fully, and the fifth partly, paid off.

In the same month of October, 1864, this bill was filed by *Charles Fountaine,* suing on behalf of himself and all other the debenture holders, against the company, praying for an account, for an inquiry as to what other mortgages and charges there were upon the undertaking of the company, and upon the tolls and sums of money comprised in the debentures, and what sums of money were due by virtue of the same; for a receiver; and that the tolls and sums of money arising by virtue of the company's

Act, and the profits arising from the undertaking, might, after payment of the necessary expenses, be applied in keeping down the interest, and in payment of the principal due on the debentures.

On the 25th of November, 1864, an order was made appointing a receiver, and directing him to apply the tolls, rates, and profits, after payment of the necessary expenses of the undertaking, in keeping down the interest on the debentures, and in payment of the principal.

In pursuance of a resolution at a meeting of directors held on the 21st of February, 1865, the directors of the company issued four debentures of £500 each to *George Eaglesfield* in return for his cheque for £1000 and an overdue *Lloyd's* bond for £1000, the interest whereon was paid to Mr. *Eaglesfield* out of the £1000 for which the cheque was given. Pursuant to another resolution of directors passed on the 22nd of March, 1865, ten other debentures for £500 each were issued to Mr. *Eaglesfield* for cash; and, pursuant to another resolution, on the 25th of July, 1865, a debenture for £1000, together with a *Lloyd's* bond for the like amount, were issued to *John Edward Lucas*, pursuant to the terms under which certain locomotives were let to and hired by the company under an indenture of lease dated the 3rd of August, 1865, and made between *Lucas* of the one part and the company of the other part.

On the 12th of June, 1865, *Robert How* was appointed receiver; and on the 24th of June, 1865, a decree was made for an account and inquiry, and the receiver was ordered to be continued.

The Chief Clerk had certified the above facts, and had reserved for the consideration of the Court the question of whether the debentures issued to *Weeks*, *Eaglesfield*, and *Lucas* were duly executed by the company under the powers of their Acts.

Mr. *G. M. Giffard*, Q.C., and Mr. *Whitbread*, for the Plaintiff:—

The debenture issued to *Weeks* was issued before *Quilter* and *Knight* were satisfied, and consequently whilst the whole of the £60,000 was outstanding.

The first four issued to *Eaglesfield*, being two of them in return for his cheque, part of which was returned to him, and the other two in exchange for a *Lloyd's* bond, and the debenture of £1000 issued to *Lucas* to secure the performance of the terms of a lease, were not a legitimate exercise of the company's borrowing powers. None of these considerations are specified in the debentures.

As to the whole, the issue was illegal, because it was not sanctioned by a general meeting, as required by the *Companies Clauses Act* (1). Moreover, the satisfaction by execution was not payment of the debentures, because the judgment creditor became a trustee for all the debenture holders: *Bowen* v. *Brecon Railway Company* (2).

Mr. *Phear*, for the company:—

I support the same contention, not wishing to repudiate a just liability, but seeking to protect the company against the consequences of a reckless issue by a former board of directors.

Appearing here as a mortgagor in a mortgagee's suit, I am entitled to my costs. If my appearance is not improper, the costs are costs properly incurred, which take priority over a debenture holder's rights.

Mr. *W. M. James*, Q.C., and Mr. *W. Pearson*, for *Eaglesfield*:—

We advanced £7000 on these debentures without knowledge of

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(1) Sections 39 and 40 of the *Companies Clauses Consolidation Act* (8 & 9 Vict. c. 16), are as follows:—

39. "If, after having borrowed any part of the money so authorized to be borrowed on mortgage or bond, the company pay off the same, it shall be lawful for them again to borrow the amount so paid off, and so from time to time; but such power of re-borrowing shall not be exercised without the authority of a general meeting of the company, unless the money be so re-borrowed in order to pay off any existing mortgage or bond."

40. "Where by the special Act the company shall be restricted from borrowing any money on mortgage or bond until a definite portion of their capital shall be subscribed or paid up, or where by this or the special Act the authority of a general meeting is required for such borrowing, the certificate of a justice that such definite portion of the capital has been subscribed or paid up, and a copy of the order of a general meeting of the company authorizing the borrowing of any money, certified by one of the directors, or by the secretary, to be a true copy, shall be sufficient evidence of the fact of the capital required to be subscribed or paid up having been so subscribed or paid up, and of the order for borrowing money having been made; and upon production to any justice of the books of the company, and of such other evidence as he shall think sufficient, such justice shall grant the certificat aforesaid."

(2) Law Rep. 3 Eq. 541, 549.

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any irregularity. Everything appeared to be in due form. As to the informality arising from the want of a general meeting, we are protected on the express authority of *Royal British Bank* v. *Turquand* (1), followed in this branch of the Court by *In re Athenæum Life Assurance Society* (2). The judgment of Lord *Wensleydale* in *Ernest* v. *Nicholls* (3) has to this extent been disapproved.

Mr. *Eaglesfield's* loans did not increase the debenture capital beyond the company's statutory power of borrowing. They were still within the £60,000.

Want of power in a company to make a contract was held to be not a good defence to an action on the contract in *South Yorkshire Railway and River Dun Company* v. *Great Northern Railway Company* (4). Where a company's deed prescribed that a policy should be executed by not less than three directors, the fact of a policy bearing the signatures of two only was held no good defence to a claim: *Agar* v. *Official Manager of Athenæum Life Assurance Society* (5). The *bonâ fide* holder of a bill of exchange accepted by a company has been held not to be bound to inquire whether it has been accepted in accordance with the provisions of the articles.

24 ChD 87.

There is nothing in the statute to prevent the directors from substituting a *Lloyd's* bond for a debenture.

Mr. *Everitt*, for *Lucas*:—

If my money has been taken, and I can sufficiently trace its application by the company, that will be sufficient to bring the case within the equity of the 38th section.

Mr. *Giffard*, in reply:—

The cases that have been cited of trading companies have very little application to the present.

The invalidity of a *Lloyd's* bond against a company is established by *Chambers* v. *Manchester and Milford Railway Company* (6), commented on in *Rashdall* v. *Ford* (7).

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1 Jur NS 1086; 2 Jur NS 663

(1) 5 E. & B. 248; 6 Ibid. 327.

(2) 4 K. & J. 549. 4 Jur NS 1140

(3) 6 H. L. C. 419. 3 Jur NS 919 923

(4) 9 Ex. 55.

(5) 6 W. R. 277. 4 Jur NS 82

(6) 5 B. & S. 588. 10 Jur NS 700

(7) Law Rep. 2 Eq. 750.

Feb. 14. SIR W. PAGE WOOD, V.C., after stating the frame of the suit, continued:—

It appears that debentures were issued to the full extent of the powers which the directors had of issuing debentures under their Act. That being so, they afterwards granted one debenture for £500 to a Mr. *Weeks,* before any of the other debentures were paid off. Afterwards two of the debenture creditors obtained judgments, and by that means obtained possession of the plant of the railway, and out of the money arising from the sale of the property so taken in execution, several debentures were paid off. When these debentures were so paid off, the directors had a power, subject to certain directions contained in the *Companies Clauses Act,* either, on the one hand, of renewing the old debentures, or, on the other hand, of issuing fresh debentures to the same amount; provided that the total limit prescribed by the Act was not overstepped. That power is required to be exercised in the following manner:—[His Honour read the 39th section of the Act.]

Then the 40th section seems to have a special view to a case of this sort:—[His Honour read the 40th section, and continued:]

I confess it is not without considerable doubt and hesitation that I have come to a conclusion in this case.

The general principles on which the Court acts with reference to public companies and the powers vested in directors, are sufficiently enunciated in the two cases of *Ernest* v. *Nicholls* (1), and *Royal British Bank* v. *Turquand* (2), affirmed in the Exchequer Chamber (3); though in the latter case it was not perhaps absolutely necessary to have given so express a decision on the point. 5 Ex 214

With regard to companies affecting to act under the *Joint Stock Companies Acts,* it has been determined, on the one hand, that where there is merely a power vested in directors to act for the company in certain special emergencies, the Court is obliged to consider all acts of directors by which it is sought to bind the company as being the acts of agents. With reference to partnerships in general, the more approved doctrine is—that other partners are not bound, except by acts of their co-partners which are within the special terms of the agency; and in the case of

(1) 6 H. L. C. 401. 3 Jur NS 919
(2) 5 E. & B. 248. 1 Jur NS 1086
(3) 6 E. & B. 327. 2 Jur NS 1036

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4 Ch [illegible]
5 Ex 214

companies, where directors are the special agents of the company, and do not possess the power of affixing the corporate seal except under certain prescribed rules, a person who deals with the directors is taken to have notice of the rules. In the case of a registered joint stock company, all the world, of course, have notice of the general Act of Parliament, and of the special deed which has been registered pursuant to the provisions of the Act; and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded.

If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (1), the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord *Campbell's* judgment in *Royal British Bank* v. *Turquand*.

The difference between those cases and the present is this. In the case of joint stock companies the deed is, I may say, expressly made a part of the general Act; because there is an express provision in the Act that all proceedings are to be taken pursuant to the deed which forms the charter of the company, so that the deed is, in truth, incorporated into the Act. But in the present case, not only is there the provision in sect. 39 of the *Companies Clauses Act*, that the company shall not exercise its power of re-borrowing, unless the money is wanted to pay off an existing mortgage or bond, without the authority of a general meeting—a circumstance which, if it stood alone, would make it very difficult to distinguish the present from the joint stock companies' cases, such as that of *Royal British Bank* v. *Turquand*—but in sect. 40, Parliament seems to have provided means whereby persons may inform themselves whether what has been done has been properly done or not. By the 40th section it is provided that where, by that or the special Act, the authority of a general meeting is required for such borrowing, then a copy of the order of a general meeting, autho-

(1) 5 E. & B. 248; 6 Ibid. 327
1 Jur NS 1186. 2 Jur NS 663

rizing the borrowing of any money, certified by one of the directors or by the secretary to be a true copy, shall be sufficient evidence of the fact of the order for borrowing money having been made. So that any prudent lender would certainly require that the directors should produce a copy of such an order; although, if it were given, notwithstanding that the Act says it shall be "sufficient" evidence of the fact, I take it, it would not be conclusive evidence as between the directors and the company, if no such order had been made. Still it would be sufficient evidence upon which any lender might reasonably act.

I look upon this distinction as one of some importance, and the matter has occasioned considerable doubt in my mind; but on the whole I think that the right construction of the section is—that the directors have power to bind the company, but then it is provided that they shall not exercise that power without the authority of a general meeting.

As regards creditors, I do not think they are intended to be protected by the clause, for this reason, that when the company have borrowed the money, and have afterwards paid it off, and so far improved the condition of the remaining creditors, their consent is not necessary to enable the directors to re-borrow. All that the directors want is the consent of a general meeting; and the creditors have no power to prevent the company, in general meeting, from raising the exact sum of money they raised before. I think the intention of Parliament was not to protect the creditors, but to protect the company against any undue acts on the part of the directors; and I have no doubt that the company, on having heard that the directors were about to do such an act without authority, might have filed a bill to restrain them.

But if I find that the directors have not (except in one instance) exceeded the limits of the power of borrowing, and that the only impropriety has been their omission to summon a general meeting, as they ought to have done before exercising the power, I think I am entitled to consider the clause as directory.

As between themselves and the company the directors may, for aught I know, be personally liable for what may have been improper acts on their part. But the company not having endeavoured before the borrowing to restrain the exercise of the power—

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the power itself not being contrary to the principle of the Act as far as the public is concerned—there being nothing to be said on behalf of the general public using the railway, or by creditors of the company holding prior bonds, which could possibly interfere with any resolution to which the shareholders might come—I find vested in the directors a full, ample, and complete power, provided only the shareholders have taken the preliminary steps. The directors have affected to bind the company by their acts, but they have omitted a solemnity which ought to have taken place.

I think the case falls within the principle enunciated by Lord *St. Leonards* in *Bargate* v. *Shortridge* (1), in which His Lordship takes the same view as was afterwards expressed in *Royal British Bank* v. *Turquand* (2).

As regards Mr. *Weeks*, I think his case particularly unfortunate; but the whole money was raised, and I see no way of relieving him. I do not find that Parliament had given to parties dealing with companies the means of knowing how much money a company had raised. Every debenture should carry on it a statement of the amount of money that has been raised. How far the directors who do these unconscionable things may or may not be personally answerable it is not for me now to consider. (1)

As Mr. *Weeks's* debenture was void *ab initio*, and the directors did not, as they ought to have done, put him in a proper position, by issuing to him a new debenture, I cannot hold that the circumstance of the company afterwards having means can enable me to treat that which was void *ab initio* as an existing security.

Mr. *Giffard*, however, says that these debts, having been only paid out of the judgments, were not paid off at all; because, according to recent decisions, a judgment debenture creditor must be treated only as a trustee for himself and all other the debenture holders. Without departing from that view, I may say this, that where the thing is done, the money is paid, and the debenture creditor has gone away with it, he cannot be brought back again; and I must treat the transaction just the same as if the company had taken it out of their own cash-box and paid him. The company having suffered their goods to be sold under a judgment,

(1) 5 H. L. C. 297. (2) 5 E. & B. 248; 6 Ibid. 327; 1 Jur NS 1006; 2 Jur NS

(1) Subsequently in an action by Mr Weeks's exor, (Weeks v Propert, L.R. 8 C.P. 427) the dirs were held to be personally

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the money having been taken, and the creditor paid, I must take it that these debentures have been paid off.

As regards the *Lloyd's* bond, I must hold that, to the extent of the sum purported to be secured by it, the debentures given in exchange for it are not valid. According to the decision in *Chambers* v. *Manchester and Milford Railway Company* (1), *Lloyd's* bonds given in respect of money simply lent are wholly invalid against the company, and cannot create a debt. Still if it can be shewn that the bond was given for money due to a contractor for works, or the like—not merely for money borrowed—the holder may make out a case, and Mr. *Eaglesfield* is consequently entitled to an inquiry if he pleases.

Then as to Mr. *Lucas*, he ought to be paid what is actually due to him under the agreement; and he also is entitled to an inquiry.

There will be a declaration that the debenture given to Mr. *Weeks* was void, as being for a sum in excess of the borrowing power of the company, which at that time had been fully exercised. Then a declaration that the debentures executed by the company subsequent to the payment of the debentures to *Quilter & Knight* were valid, notwithstanding the want of a resolution of a previous general meeting of the company. Then a declaration, subject to such inquiry as I have offered to Mr. *Eaglesfield*, that the four debentures for £500 each given to *Eaglesfield* in consideration of a payment of £1000, and a surrender of a *Lloyd's* bond for £1000, are a good security for £1000 only; the surrender of the said *Lloyd's* bond not constituting a good consideration for such debenture. Then, as regards the debenture to *Lucas*, declare it to be a security only for money actually advanced by him under the agreement.

The Plaintiff will have his costs out of a fund standing in Court; the others to tack their costs to their debts; the company to have no costs; liberty to apply in Chambers from time to time with reference to any subsequent costs.

Solicitors for the Plaintiff: Messrs. *Woodrooffe & Plaskitt.*
Solicitor for the Company and for Mr. *Lucas:* Mr. *Ivimey.*
Solicitors for Mr. *Eaglesfield:* Messrs. *Vizard & Co.*

(1) 5 B. & S. 588, 10 Jur NS 700

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RISHTON *v.* GRISSELL.

Manager of Works—Agreement—Salary—Percentage of Profits of Business—Principles on which Account should be taken.

The Defendant, in 1858, agreed that the Plaintiff should act as the manager of his works, and should receive in each year 7½ per cent. of the profits of the business, to be made up to £500 in any year in which the said share of profits should be less than that sum. In the same year a valuation of the buildings, stock, plant, and goodwill was made. In 1864 the Defendant sold the buildings, stock, and business at an increase over the valuation of £47,916.

In taking the accounts under the above agreement:—

Held, that the Defendant was not entitled to charge the profit and loss account in every year with interest on his capital, nor with interest on old debts, nor with £500 in respect of the Plaintiff's salary:

Held, further, that the Defendant was entitled to charge the profit and loss account in every year with sums representing the depreciation arising from the running out of the lease, and the waste of plant and machinery:

Held, also, that the Plaintiff was not entitled to treat as profit of the year in which the property was sold, the excess of the amount realized by the sale over the estimated value; but that the estimated value of stock first set down must run through the whole account; the annual depreciations being calculated on that constant quantity.

THIS was an adjournment from Chambers.

By an agreement in June, 1858, between the Defendant, *Henry Grissell*, then the owner of the *Regent's Canal Ironworks*, and the Plaintiff, *John Edward Makon Rishton*, it was agreed that the Plaintiff should act as manager of the said works, and should receive in each year 7½ per. cent. of the profits of the business, to be made up to £500 in any year in which the said share of profits should be less than that sum.

In that year the buildings, stock, machinery, plant, and other assets of the business had been valued on the retirement of a former partner, and stood in the books at about £22,000.

On the 4th of July, 1864, the Defendant agreed to sell his works and business to the *Regent's Canal Ironworks Company, Limited*, for the sum of £70,000, and upwards.

In April, 1865, this bill was filed for specific performance of the agreement, and for an account; and by a decree dated the 19th of July, 1867, inquiries and accounts were directed.

S.C. on appl 10 Eq 393.

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The Defendant had brought in various accounts under the decree; but it was found that they could not well be proceeded with until various questions affecting the principle on which they were to be taken were settled; and the parties being desirous of taking the Vice-Chancellor's opinion, the Chief Clerk now submitted the following preliminary questions:—

1. The Defendant had charged interest on his capital in the business.

2. In the profit and loss account he had charged interest on old debts due from the business.

3. In the same account he had charged the payments made to the Plaintiff on account of his guaranteed £500 per annum; and in the account for 1864 he had charged £554 paid to the Plaintiff in respect of his share of profits for the years 1859 and 1861.

4. In the same account he had charged for each year a percentage on the value of the leasehold premises in which the business was carried on in respect of the depreciation arising (as he considered it) from the leasehold term running out from year to year, also sums annually for depreciation of plant and machinery.

5. The Plaintiff claimed 7½ per cent. on £47,916, being the difference between what the items stood at in the books when the agreement was made with the Plaintiff in 1858, and the sum of £70,000 received of the *Ironworks Company.*

[The question as to the £554 was conceded by the Defendant's counsel.]

Mr. *Willcock*, Q.C., and Mr. *Hemming*, for the Plaintiff:—

As to the interest on capital: it is a well-established rule that, unless a contrary course of practice be shewn by the books, no interest is chargeable by one partner against a co-partner: *Hill* v. *King* (1). This was a quasi-partnership, not, indeed, that the acts of the manager could bind the firm, but that he was entitled to a share of profits on exactly the same terms as a partner who brings in no capital.

As to the interest on old debts: it is not right that interest in respect either of the Defendant's capital or of borrowed capital

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(1) 9 Jur. (N.S.) 527. 3 DeG J. S. 418

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should be first deducted, for the bargain was that the Defendant was to find the capital, and the Plaintiff the skill and labour.

The £554 has been conceded; and the deduction of £500 a-year must follow on the same principle. The £500 was merely a substitute for the 7½ per cent., whenever the latter should fall short of that amount.

The fourth and fifth points go together. We say that whenever the true price of the property is actually ascertained (as here by the sale in 1864), we are entitled to bring into account the true value in place of any estimated value. The estimated depreciations were properly entered while the fact was doubtful, but when it turns out that there has been an increase of value instead of a depreciation, this should be brought to account as profit of the year when it is ascertained, without disturbing the accounts of former years. The evidence proves this to be the received way of keeping partnership accounts.

[The Vice-Chancellor:—Is a lucky speculation in the sale of property part of commercial profit?]

Everything by which the stock is increased—everything which comes in by way of gain, from whatever source—should go into the books as profit. That is the commercial meaning of the word "profit."

The Vice-Chancellor said he would not call upon the Defendant on the last two points.

Mr. *Pearson*, Q.C., and Mr. *Kekewich*, for the Defendant:—

The real agreement between the Plaintiff and Defendant was this: "You, the Plaintiff, are to have £500 a-year for your services; and besides, you are to have the excess of 7½ per cent. on the profits over £500.

As to the interest upon capital, a particular state of circumstances will induce the Court to presume that the course of dealing between partners has been to allow interest on capital: *Millar* v. *Craig* (1).

No doubt, as a general principle, interest is not to be allowed between partners. But this is not a case as between partners. The Plaintiff was not liable for the debts of the partnership. It is, therefore, a question of contract; and in the absence of stipulation, profits must be taken as they actually are, namely, the excess of returns over outlay. What is outlay? First, rent, then interest on capital, then price of materials, then wages. All must be deducted before a profit can be struck.

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(1) 6 Beav. 433.

As to the old debts, what has the Plaintiff to do with the Defendant's obligations? Had the Plaintiff never been heard of, the Defendant must have deducted this interest before he could have deposed on oath as to his profits. How could the agreement alter this state of things?

On the same principle, the Defendant's profits must be reduced by the £500 a year.

There is no such thing in law as a quasi-partnership.

Mr. *Willcock*, in reply:—

Estimates are invariably low; the only true test of value is a sale.

Sir W. Page Wood, V.C.:—

The whole of this question is determined by attending to the circumstance that the Plaintiff was employed by the Defendant as manager. That was his exact position, neither more nor less. The Defendant agreed to give him 7½ per cent. of the profits in each year, with a guaranteed minimum of £500 a year. In other words, if the profits in any year did not amount to £500, they were to be taken at that amount.

An agreement of this sort is not a very wise arrangement on the part of an employer, because it gives to the person employed a right to overhaul the books and accounts of the partnership. But it gives the person employed no right or interest in the partnership concern; only a percentage on yearly profit.

Now, taking this leasehold property, plant, and machinery—that will be a constant quantity, subject only to the modifications which may have taken place in each current year. If the plant and machinery were originally put down at £20,000, or at £50,000, it would not make the slightest difference to the person employed.

He has no interest in it. At whatever price it is first put down, at that amount it must be put down, subject only to depreciation, in the following year; and being put down as a constant quantity, it will strike itself out on both sides of the account, and be carried through the books at the same amount to the end of the partnership. If some new street were opened, the property might be sold at ten times the amount; but with that the Plaintiff can have nothing to do; he would have no profit upon the sale of the concern.

The proper course to take would be—that every article or item of expenditure laid out, not only in buying stock, but in the improvement of the premises, should be debited in the profit and loss account. Suppose the lease, plant, and machinery to be taken at a fixed sum of £20,000, and £5000 to be laid out in improvements, the profit and loss account must be debited with this new item of £5000, and credited with the depreciation arising from the running out of the lease, and the deterioration of the plant and machinery.

The Plaintiff has a right to a percentage upon the profits *de anno in annum*, but to nothing more. Otherwise he would have a right to have a sale, for he might refuse to rest upon the Defendant's estimate of the profits, and demand a sale. That cannot have been the intention of the parties, and the Court will not enforce the contract in that way. All that the Court has to do is to see that a *bonâ fide* estimate has been made, and not an estimate made merely at the arbitrary will of the employer.

Let us take the question of the running out of the lease. Suppose it to be known that, from adventitious circumstances, the value of the lease has risen largely at the end of the second year, the Plaintiff would not be entitled to put that increase into the profit and loss account. If it were originally valued at £20,000, he would be entitled to have the depreciation arising from the running out of the lease carried into the accounts, but a depreciation calculated on the £20,000, not on the increased value. Therefore, as to the fourth and fifth items, all the Court has to do is to see that the value of the lease, and the value of the machinery and plant, are uniformly charged in the accounts, and that the depreciations are calculated upon these constant quantities.

With respect to the three other items, I am in favour of the Plaintiff. I had at first a little doubt on one point, but on subsequent reflection I have none. The Plaintiff's engagement was that he was to be paid out of the yearly profits, and he was not to be called upon to advance a sixpence of capital. Then what is his right, as respects the employer's capital, with regard to the carrying on of the business? He has a right to expect that the employer will carry on the business with his own capital, but he has no right to inquire whether the employer has borrowed the capital, or how he has acquired it. He finds it is there; he is acquainted with the whole concern; he sees it at work; and he enters into the engagement I have described. He has a right, therefore, to expect that the employer will provide the necessary capital. I think the employer cannot claim a right to deduct £5 per cent. by way of interest upon capital before profits are estimated, on the ground that if he had put his money into another business he could have got that interest, although it may be that, according to writers on political economy, interest is to be first charged upon capital. Suppose a thing is bought for £100 and sold for £103, that may be a very bad trade bargain; still, poor as the gain is, it is profit, and the manager has a right to claim it, without any previous deduction for interest upon capital, unless there be some special stipulation to that effect.

The express point has been decided in this Court, that unless there be an express stipulation, or a particular course of practice shewn by the partnership books to the contrary, interest between partners is not allowed.

I confess I was at first struck with the argument that the employer might have to carry on business with borrowed capital, on which he would have to pay £5 per cent., and that the profit must be taken after that £5 per cent. has been deducted. But the manager, in this instance, does not know where the capital comes from, and has no right to inquire. Therefore it appears to me that neither as to the borrowed capital, nor as to the Defendant's own capital, has the Defendant any right to charge interest as against the Plaintiff in the estimate of profits.

The other question as to the £500 is much clearer. The Defendant is not entitled to deduct the £500 payment before the profits

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are estimated. The profits might amount to £750, then upon what principle can the Defendant deduct the £500? He says there might be a year in which there was no profit at all. But he has undertaken that the 7½ per cent. shall always amount to at least £500; and he cannot deduct the £500 before he takes the percentage.

As to the first three items I concur with the Plaintiff's view, and as to the fourth and fifth with that of the Defendant.

The costs will be costs in the cause, and there will be a direction that the accounts be taken according to the Plaintiff's contention as to the first, second, and third items, and according to that of the Defendant as to the fourth and fifth.

Solicitor for the Plaintiff: Mr. *H. Skynner.*

Solicitors for the Defendant: Messrs. *Bircham, Dalrymple, Drake, Bircham, & Burt.*

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Jan. 30.

11 Eq 252

GUNSON *v.* SIMPSON.

Trustee Act, 1850, *s.* 11—*Vesting Order—Sole Trustee for Sale pre-deceasing Testatrix—Heir of Testatrix not found.*

Where a testatrix devised real estate on trust for sale, but there had never been a trustee of the will, in consequence of the death in the testatrix's lifetime of the sole trustee named in the will; and it was not known who was the heir of the testatrix:—

Held, that the Court had no jurisdiction under the *Trustee Act*, 1850, in the absence of the heir, to appoint a trustee and to make an order vesting in him the real estate descended.

THIS was a Petition under the *Trustee Act*, 1850, for the appointment of a new trustee in the place of a sole trustee who had died in the testatrix's lifetime, and for an order vesting in such trustee the real estate descended.

The testatrix in the cause, *Ann Lawson*, by her will dated the 12th of May, 1860 (before the date of the passing of the 23 & 24 Vict. c. 145), devised and bequeathed all her real and personal estate to the above-mentioned trustee: upon trust for sale, the proceeds to be divided amongst the Petitioners and the trustee in the shares therein specified. The will contained no power to appoint new trustees.

The testatrix died on the 19th of January, 1867.

The bill was filed by two of the persons interested in the proceeds of sale, praying for the execution of the trusts of the will, and for the appointment of new trustees. On the 9th of March, 1867, the usual decree was made for the execution of the trusts, and ordering accounts and inquiries. The decree also directed the real estate to be sold.

From the evidence on this Petition it appeared that the real estate consisted of a freehold house which had been untenanted since the testatrix's death, and that the expense of keeping it in repair rendered an immediate sale desirable; that the inquiry as to who were the testatrix's heir and next of kin was likely to be very prolonged; and that in the meantime the heir was not known.

On the 18th of January the Vice-Chancellor made an order in the terms of the prayer of the Petition, but an objection was taken in the Registrars' office that, as there never had been a trustee of the will, the Court had no jurisdiction under the statute to make the order.

Mr. *Mounsey*, for the Petitioners:—

It cannot be said that there is no trustee in this case, for this is a Petition in a cause in which a decree has been made for sale: *Wilks* v. *Groom* (1). In such a case the heir is a trustee.

THE VICE-CHANCELLOR:—In the instances where a testator has directed his property to be sold without devising the legal estate, and the Court has held the heir to be a trustee, the heir was present. In this case he is absent, and apparently not bound by the decree.

Mr. *Mounsey* submitted that the order might be made in his absence, he being a trustee within the Act, as in those cases where it has been held that the infant heir of a surviving trustee, or of a mortgagee, need not be served with a Petition for a vesting order.

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(1) 6 D. M. & G. 205. 2 Jur NS 1077

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Gunson v. Simpson.

Sir W. Page Wood, V.C.:—

This is not quite a similar case. Here it is the heir of the testatrix who is absent, not the heir of the trustee. In the cases referred to I think it will be found that there was some difficulty in serving the heir, or something to bring the case within the 11th section of the Act. Here the heir is the person principally interested. You had better see what evidence you can get to bring the matter within the 11th section of the Act, as I do not think I can make the order in the absence of the heir.

The Petition must stand over.

Solicitors: Messrs. *Helder & Kirkbank*, agents for Mr. *McKelvie, Whitehaven.*

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2 Ch. D. 39

In re ROBERT JAMES, Deceased.

Practice—Settled Estates Act (19 & 20 *Vict.* c. 120)—*Infant—Guardian to consent.*

In a Petition under the *Settled Estates Act* for a sale of property in which an infant is interested in remainder the consent of the testamentary guardian of the infant is not sufficient, and a guardian must be appointed for the purpose of consenting on behalf of the infant.

Mr. *FREEMAN* mentioned a difficulty which had occurred in this case upon a Petition under the *Settled Estates Act* for a sale of property of which an infant was tenant in fee in remainder.

The point was, whether the testamentary guardian of the infant was a guardian capable of consenting to the application on behalf of the infant within the meaning of sect. 36 of the *Settled Estates Act* (19 & 20 Vict. c. 120), or whether it was necessary to appoint a special guardian to consent on behalf of the infant.

Daniell's Chancery Practice (1), where it is stated, "the testamentary guardian of an infant is a guardian within the meaning of the foregoing section (sect. 36)," and the cases cited in the notes, were referred to.

Sir W. Page Wood, V.C., after consulting the Registrar, said that, resting upon the language of the Act (19 & 20 Vict. c. 120,

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(1) Vol. ii. p. 1811, ~~3~~rd Ed. 4/

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s. 36), he should have thought that the consent of the testamentary guardian would have been sufficient; but having regard to the Orders (Cons. Ord. XLI. r. 23, and Judges' Regulations, 8th Aug. 1857, r. 21), he considered that it was necessary to appoint a guardian for the purpose of consenting to the application on behalf of the infant.

Solicitors: Messrs. *Rogerson & Ford.*

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DAY *v.* LUHKE.

Specific Performance—Public-house—Sale as going Concern—Transfer of Licence—9 Geo. 4, c. 61, ss. 11, 14.

3 C P 515, -8,
520, -1
7 Ch 12, 13 14/15,
16,
2 C P D. 346
10 Ch D 739.

Upon the sale of a public-house as a going concern time is of the essence of the contract; and, in the absence of express stipulation to the contrary, the licence of the house must be transferred under sect. 11 of the *General Licensing Act* (9 Geo. 4, c. 61), and not under sect. 14.

Where, therefore, upon the day fixed for completion of a sale of a public-house as a going concern, the vendors were not in a position to procure a transfer of the licence under sect. 11:—

Held, that the purchaser was entitled to repudiate the contract.

Mortgagees of a public-house are not assigns of the licensee within the meaning of 9 Geo. 4, c. 61, s. 11.

THIS was a suit by vendors for the specific performance of a contract to purchase a public-house at *Norwood*, in the county of *Surrey*, called *The Alliance*. The house was in the beginning of 1866 held by one *Robert Sinkler*. In February, 1866, *Sinkler* mortgaged it to the Plaintiffs by a deed which contained the ordinary power of sale. In August, 1866, *Sinkler* absconded. In October following the Plaintiffs put up the public-house for sale by auction as a going concern. By the conditions of sale the fixtures and stock in trade were to be taken at a fair valuation by two appraisers and two gaugers, and their respective umpires, to be chosen in the usual way, and the purchaser was to pay for and in respect of the licences and insurances subsisting at the time of the completion of the purchase a sum proportionate to the time unexpired therein. On the 29th of October, 1866, the Defendant became the purchaser at the price of £2000. The fixtures were subsequently duly valued at £300 1*s*. The stock in trade was not valued, for reasons which will appear in the sequel.

The day fixed for the completion of the contract was the 19th of November, 1866, but was afterwards, by consent, changed to the 21st. The day of completion is called in the trade "the change," and what then takes place was thus described by one of the witnesses, Mr. *Nevitt*, a clerk to the firm of Messrs. *Meux & Co.*:—

"On the day appointed for completion, which is technically

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called 'the change,' the vendor and purchaser, with their respective solicitors, brokers, and gaugers, ... meet at the purchased premises. The brokers produce their valuation of the furniture, fixtures, and other effects (exclusive of the stock in trade), which they have previously made, and the gaugers then gauge the stock in trade, so as to ascertain the exact amount thereof then on the premises, and an account is then made up, shewing the particulars and total amount of the sums payable to the vendor for the purchase-money and valuations, and for the unexpired licences and insurances, after allowing for rent, rates, and taxes unsatisfied. The total amount payable on that account is then (subject as before mentioned) collected by the purchaser's broker from . . . . the purchaser, and is handed over to the vendor's broker.

"Directly after the stock in trade has been gauged, and the amount ascertained, the vendor takes out of the till all the money therein contained, and hands over the conduct of the business to the purchaser, who from that moment becomes entitled to all the profits arising from the trade, which trade is not for an instant interrupted by any of the proceedings connected with the change.

"At this meeting, and before the final completion of the purchase, the vendor, or the person holding the licence on his behalf, indorses his name to a memorandum on the licence purporting to assign the same to the purchaser, and signs a notice of application for transfer in the form required by the 11th section of the Act 9 Geo. 4, c. 61, and if there be any doubt whether the licensee will attend at the special sessions to support his application for transfer, and if he has not previously executed a power of attorney for that purpose, he is required to sign, and does sign, a power of attorney authorizing the purchaser's broker, or some other person, to represent him at the special sessions. The brokers usually take with them to a 'change' printed forms of notice and powers of attorney to be filled up. Unless the transfer of the licences is thus provided for at 'the change,' I would not advance money on the house, and no prudent broker or solicitor accustomed to this class of business will permit a purchaser to complete his purchase. Changes are frequently broken up, and the contract for purchase abandoned, in consequence of there being a difficulty about the transfer of the licence" (1).

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(1) The *General Licensing Act* (9 Geo. 4, c. 61) provides (sect. 1) that there shall be annually holden a special session of the justices of the peace (to be called "The General Annual Licensing Meeting") for the purpose of granting licences to persons keeping or about to keep inns, ale-houses, and victualling-houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises therein specified; and that such meeting shall, in the county of *Surrey*, be holden within the first ten days of the month of March; and (sect. 4) that at the general quarter sessions not less than four, nor more than eight, special sessions shall be appointed to be held, at which special sessions it shall be lawful for the justices in manner and for the time thereinafter directed to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as the justices shall, in their discretion, deem fit and proper persons, under the provisions thereinafter enacted, to be licensed to sell exciseable liquors by retail, to be drunk or consumed on the premises.

Sect. 11 provides as follows:—"Every person holding a licence under the authority of this Act, or his heirs, executors, administrators, or assigns, being desirous to transfer such licence to some other person, and intending to apply at the special session then next ensuing for permission so to do, shall, five days at the least prior to such special session, serve a notice of such his intention upon one of the overseers of the poor, and upon one of the constables or other peace officers of the parish or place in which the house kept by the person so holding such licence is situate, and every such notice shall be written in a fair and legible hand, or printed, and shall be according to the form in the schedule hereunto annexed marked B., and shall be signed by the party intending to make such application, or by his agent thereunto authorized, and shall set forth the christian and surname of the person to whom it is intended that such licence shall be transferred, together with the place of his residence, and his trade or calling, during the six months previous to the time of serving such notice."

By sect. 13, all licences granted under the Act are to be in force in *Middlesex* and *Surrey* from the 5th of April, and elsewhere from the 10th of October, after the granting thereof, for one whole year thence respectively next ensuing, and no longer.

Sect. 14 provides as follows:—"If any person duly licensed under this Act shall (before the expiration of such license) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt, or shall take the benefit of any Act for the relief of insolvent debtors; or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected, to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; or if any house being kept as an inn by any person duly licensed as afore-

This witness also deposed that if it were known at the time when a public-house is put up for sale that the vendors were not in a

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said shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose, or shall be, by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn, it shall be lawful for the justices assembled as aforesaid at a special session holden under the authority of this Act for the division or place in which the house so kept or having been kept shall be situate in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall, by sale or otherwise, have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell exciseable liquors by retail, to be drunk or consumed in such house or the premises thereunto belonging, or to grant to the person whose house shall, as aforesaid, have been, or shall be about to be, pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein: Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing, as the case may be; provided also, that every person intending to apply in any of the above-mentioned cases at any such special session for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house or premises thereunto belonging in which exciseable liquors shall not have been sold by retail, to be drunk or consumed on the premises, by virtue of a licence granted at the general annual licensing meeting next before such special session, shall, on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in the forenoon and of four in the afternoon, affix or cause to be affixed on the door of such house, and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, on some other public and conspicuous place within such parish or place, such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house not theretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor, and on one of the constables or other peace officers of such parish or place."

By sect. 18, persons selling exciseable liquors without a licence are made liable to a penalty of not more than £20, and not less than £5, for each offence.

By 5 & 6 Vict. c. 44, s. 1, the jus-

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position to ensure a transfer of the licence under sect. 11 of the Act 9 Geo. 4, c. 61, the value of the house would be materially diminished. In this he was confirmed by the auctioneer.

Upon an application for a transfer of a licence under sect. 11 the magistrates are in the practice of requiring the transferor to appear either by himself or his attorney.

The licence of the house had originally been granted to one *Holder*, and up to the 21st of November the Plaintiffs believed that the licence continued in his name. On that day, at "the change," it was for the first time discovered by them that the licence had been transferred to *Sinkler*. As the mortgage by *Sinkler* contained no power of attorney to the mortgagees to apply for a transfer of the licence under sect. 11 of the Act 9 Geo. 4, c. 61, it was proposed by the solicitor for the vendors that proceedings for that purpose should be taken under sect. 14; and that in the meantime the valuation of the stock in trade should be postponed. The Defendant, however, did not assent to this proposal, and on the day after caused to be sent to the vendors' solicitor a letter repudiating the contract.

On the 2nd of January, 1867, the Plaintiffs gave notice to the Defendant that they intended to apply at the next special sessions of the magistrates for the county of *Surrey* for permission to transfer the licence to the Defendant under sect. 11 of the Act 9 Geo. 4, c. 61, and if that section should be held to be inapplicable, then for a new licence to the Defendant under sect. 14; and they requested the Defendant to give them the necessary information for filling up the requisite notices. With this request the Defendant did not comply, and at the special sessions held on the 12th of January the Plaintiffs applied for the grant of a licence under sect. 14 to *Alfred Holder*, who had managed the business under *Sinkler*, and was then in occupation of the premises. The magistrates refused the application, on the ground that *Holder* was not a "new tenant or occupier of the house be-

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tices of the peace are empowered at petty sessions, in those cases in which at a special sessions the justices may grant or transfer licences, to authorize any person, to whom it may be proposed to grant or transfer a licence, to carry on the business of a licensed victualler at the same house until the next ensuing special sessions, and no longer.

coming unoccupied" within the meaning of sect. 14, but they suggested that the house should be closed for a few days, and an application made for a new licence on next licensing day. The house was accordingly closed for two or three days in January, and on the 2nd of March the Plaintiffs applied for a new licence to *Holder*. The Defendant opposed the application, and it was refused.

In June, 1867, the application was renewed by the Plaintiffs; and the Defendant having abstained from any opposition, a licence was granted to *Holder*, who was simply a nominee of the Plaintiffs, and was willing and ready to transfer the licence to the Defendant. The business had been carried on continuously by *Holder*, with the exception of the few days during which the house was closed. Under these circumstances the Plaintiffs sought to have the contract specifically enforced.

Mr. *Jessel*, Q.C., and Mr. *Smart*, for the Plaintiffs:—

It will be said that in this case time is of the essence of the contract; but, in the first place, that is shewn not to be the case by the fact that the day for completion was altered from the 19th to the 21st of November. Further, the conduct of the Defendant has alone prevented the completion of the contract. The vendors were willing to take, and did take, all proper steps for procuring a licence to be granted to him. They could not transfer the licence, only the magistrates could do that; and assuming that the vendors were bound to convey to him a house which could be continuously used as a public-house, they were able to do so as much as on the sale of any other public-house. It is clearly the ordinary practice for the vendor to transfer the licence, and for the purchaser to take possession of the house, on the day of "the change;" and even if the day of "the change" was the same as that fixed for petty sessions (which is not generally the case), still a few hours must elapse between possession being taken and the carrying on the business being sanctioned by the magistrates under 5 & 6 Vict. c. 44, s. 1, and by carrying on the business during these hours the purchaser exposes himself to a penalty under 9 Geo. 4, c. 61, s. 18, but in practice this penalty is never exacted. In sect. 11 the word "assigns" means assigns of the property in respect of which the licence was granted. The vendor was such assign, and if the Defendant had given the necessary information the licence would have been transferred under that section on, if not before, the 12th of January; and even if it can be held that the vendors are not such assigns, still the vendors might have applied for a new licence under sect. 14; and, in fact, it was entirely due to the opposition of the Defendant that such a licence was not granted in March.

Mr. *Baggallay*, Q.C., and Mr. *Freeling*, for the Defendant:—

Upon the sale of a public-house as a going concern time is of the essence of the contract: *Coslake* v. *Till* (1); *Seaton* v. *Mapp* (2); *Forrer* v. *Nash* (3); *Gedye* v. *Duke of Montrose* (4); *Nokes* v. *Lord Kilmorey* (5); *Walker* v. *Jeffreys* (6).

The whole difficulty in this case arose from the neglect of the Plaintiffs to procure a power of attorney from *Sinkler*. It was clearly understood that the transfer of the licence was to be under s. 11. Under that section the magistrates require two things only to be proved, viz., that the transferor "has parted with his interest in the licence;" and that the proposed transferee is of unobjectionable character. To prove the first of these things, the magistrates require the transferor to be present either personally or by attorney. That could not be done here; and the Plaintiffs could not apply as assigns of *Sinkler*, for the word "assign" in the 11th section means an assign of the licence, not of the property in respect of which the licence is granted. Then it is proposed that an application be made under s. 14. But even under that section it would be impossible to obtain a new licence; for the word "assigns" there refers only to assigns of persons "by sickness or other infirmity becoming incapable of keeping an inn." Supposing, however, that a licence could be granted, still the mode of obtaining it is very different from that under s. 11. It involves delay: the magistrates, exercising a judicial discretion, must be satisfied that it is proper, under all the circumstances of the case, that a new licence be granted; and the cost is greater. Under these circumstances,

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(1) 1 Russ. 376.
(2) 2 Coll. 556.
(3) 35 Beav. 167. 11 Jur. N.S. 789.
(4) 26 Beav. 45.
(5) 1 De G. & Sm. 444.
(6) 1 Hare, 341.

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the Defendant was not bound to complete: *Roberts* v. *Berry* (1); *Tilley* v. *Thomas* (2).

Mr. *Smart*, in reply, referred to *Dakin* v. *Cope* (3).

3cP517

Mar. 16. LORD ROMILLY, M.R., after stating the facts of the case, continued:—

In the first place, I entertain no doubt that in the sale and purchase of a public-house as a going concern time is of the essence of the contract. This is established by the cases of *Dakin* v. *Cope*, and *Seaton* v. *Mapp* (4), and is in accordance with all principle relating to the subject. I think the day of "the change" being altered from the 19th to the 21st of November does not in the slightest degree affect the principle, or amount to any waiver on the part of the Defendant to the complete transfer being made on the latter day.

The question then resolves itself into this: were the Plaintiffs on the 21st of November, 1866, in a position to complete the transfer of the business? This depends in some degree on the construction to be put on the Act which regulates the granting of licences to keepers of inns, alehouses, and the like, in *England*, 9 Geo. 4, c. 61. The question is, whether the transfer of the licence to the purchaser, the Defendant in this case, could be effected under the 11th or the 14th sections. The 11th section is this:—[His Lordship read it.]

The Plaintiffs contend that under the word "assigns" used in this clause, the mortgagees would be entitled to serve the notice and obtain the transfer; but I am of opinion that, looking at all the sections which refer to the subject, such is not the true construction of the clause, and that the word "assigns" here refers to a person *ejusdem generis* with the heir, executor, or administrator—that is, to somebody who can, after the decease of the holder of the licence, deal with it in the ordinary manner. That this is the construction which in practice is and has been put on this section is manifest from the evidence on both sides, and from what occurred in the present case. Accordingly, the vendors have recourse to the 14th section in order to obviate this difficulty. The section itself is in these words:—[His Lordship read it.] Here the distinction is properly taken between the heirs, executors, and administrators of a deceased person and the assigns of a person alive, and it is under this section, and this alone, that, in my opinion, the proper transfer of the business in this case could be obtained in the absence of *Sinkler*, or of any authority from him. The Defendant objects to proceeding under this section on account of the delay, and also the risk of carrying on business without a licence. In answer to this the Plaintiffs contend that the risk is very small, and that, in fact, some cessation of the business of a public-house must take place in any sale; for that if the holder of the licence attends at "the change," and signs the notices, and indorses the licence, still, until the five days have expired the purchaser would not legally be entitled to carry on the business, which, in fact, he always does. I think that this difficulty is met by the statute of 5 & 6 Vict. c. 44, which seems to me to have been enacted to obviate this objection; but assuming it to be true that such is the case, there is a great difference between the two cases. Practically, no difficulty arises in this respect under the 11th section; the transfer of the licence by the magistrates at the expiration of the five days is a matter of course, and no discretion at all is exercised by them in this matter, unless they should have information that the transferee was an objectionable person, and no person ever attempted to enforce a penalty for carrying on the business during the five days of abeyance. But it is a very different matter under the 14th section, when the magistrate, in fact, performs a judicial duty, as is shewn by the evidence and by the facts of the case. Here, according to the testimony on both sides, the purchaser firmly expecting, as according to all the testimony he was entitled to expect, that according to the ordinary case he should get the transfer in five days under the 11th section, finds on attending that he must have recourse to the 14th section, with all the delay and doubt attendant upon it, and that he would have to wait, not five days, but, in fact, as appears from what occurred in the present case, for several weeks, probably till the month of March following, before he obtained any licence at all.

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(1) 3 D. M. & G. 284.

(2) Law Rep. 3 Ch. 61.

(3) 2 Russ. 170.

(4) 2 Coll. 556.

It appears that the Defendant in person opposed the application which was made in March, 1867. I think that this was perfectly wrong on his part; he had repudiated the purchase, and he should have abstained from any interference in the matter. But what he did on that occasion does not, in my opinion, amount to any waiver of the objection, or to any acquiescence on his part to waive the objection, to the contract previously repudiated by him. Whether, in respect of this opposition, the Defendant inflicted any damage on the Plaintiffs for which he might be liable in any action, is not the question before me. I assume, and, indeed, I am of opinion, that the magistrates, in the course they adopted, acted on a proper construction of the statute, and consequently, that if the Defendant had waived the objection he would not have been able to obtain a temporary licence under the 14th section of the first statute without considerable delay and without temporary suspension of the business for two or three days, the evil effect of which cannot be accurately estimated by this Court. The statute of 5 & 6 Vict. c. 44, which entitles the keeper of the public-house to obtain a temporary licence in petty sessions, applies, as it appears to me, to the case of a transfer under the 11th section of the prior Act, and is made in order to avoid the difficulty raised by the Plaintiffs' counsel, which I have already referred to.

I have throughout this case omitted the consideration that in any case of a transfer the magistrates have the power to refuse the transfer of the licence if the transferee should be an objectionable person. It does not affect the case at all, no such suggestion is made, nor is any question raised upon it.

I am of opinion that the Defendant bought under the 11th section and not under the 14th. I am also of opinion that where the sale of the public-house as a going concern takes place under the 14th section this ought to be mentioned in the particulars of sale. When I say sale under this section, I mean that the transfer of the licence is to be effected according to the provisions of the 14th section. When the particulars are silent, it is to be assumed that the transfer of the licence will be under the 11th section.

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In truth, the real difficulty has arisen from the Plaintiffs not having obtained the proper power of attorney from *Sinkler* when they took the mortgage of the house from him. The witness *Nevitt* and the auctioneer concur in saying that if it were known at the time when a public-house was put up for sale that the vendors were not in a position to ensure the transfer of the existing licence under sect. 11, this circumstance would materially affect the value of the house as a public-house sold as a going concern, and that it ought to be mentioned at the sale in the auction room if not set forth in the particulars of sale. This was not done; and, in my opinion, the Defendant was entitled to repudiate the contract as soon as he discovered it. He did so within twenty-four hours; he has done nothing since to waive the objection; and he is not, in my opinion, compellable to complete the contract, and the consequence is that the bill must be dismissed with costs.

Solicitors: Mr. *G. H. K. Fisher*; Messrs. *Hunter, Gwatkin, & Hunter.*

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March 7.

In re PHENE'S TRUSTS.

Will—Power—Implied Gift—Class, when ascertained—Joint Tenancy, or Tenancy in common.

7 Eq 521-2
[illegible]
1 App Cas 433
24 Ch D 246
247, 257

A testator gave £3000 to his executors upon trusts for the benefit of *M.* during her life, and from and immediately after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage." The executors died in the lifetime of *M.*:—

Held, that the children of *M.* who were living at the time of her death were entitled to the fund in equal shares as tenants in common.

EDWARD PHENE, by his will, dated the 2nd of November, 1836, bequeathed to his executors the sum of £3000 £3 per Cent. Reduced Annuities, upon trusts for the benefit of his sister *Charlotte Mill* during her life; and from and immediately after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage."

Charlotte Mill died on the 28th of May, 1867, having had issue five children, two of whom died in her lifetime. Of the other three, one had not been heard of for many years, another died in January, 1868, and the third was still living.

The executors named in the will died in the lifetime of *Charlotte Mill*, and the fund was after her death transferred into Court by the legal personal representatives of the surviving executor.

A Petition was now presented by the surviving child of *Charlotte Mill* for payment or transfer to him of such share of the fund as he was entitled to under the will of the testator.

Two questions were raised :—1. Whether the children who predeceased the tenant for life took any interest in the fund; and 2. If they did not, whether the children who survived the tenant for life took as tenants in common or as joint tenants.

Mr. *Bagshawe*, for the Petitioner :—

If the executors had now been alive they would have been entitled to divide the fund between the surviving children, and those only; and therefore the Court, which stands in their place, ought to divide it between them: *Re White's Trusts* (1). [He was then stopped.]

Mr. *Bristowe* (Mr. *Karslake*, Q.C., with him), for the representatives of the deceased children :—

The executors would have had power, with the assent of the tenant for life, to select any of the children as objects of the testator's bounty; and can the circumstance that they did not exercise this discretion take away what would otherwise have been a vested interest in the children? The will ought to be read as if the clause conferring the discretion had not been inserted in the will: *Brown* v. *Higgs* (2); *Sugden* on Powers (3). If all the children but one had died in the lifetime of the tenant for life, it could never be contended that the sole survivor would be entitled to the whole of the fund. At all events, the surviving children take as tenants in common.

Mr. *Bagshawe* admitted that *Re White's Trusts* was an authority for holding that the children took as tenants in common.

(1) Joh. 656.

(2) 8 Ves. 561.

(3) 8th Ed. p. 589.

LORD ROMILLY, M.R. :—

I think it is very clear that only the children who survived their mother take, and that they take as tenants in common.

The case of *Brown* v. *Higgs* (1) shews that a testator may give to his executors an arbitrary power of determining to whom a fund shall go; and that if he does so, this arbitrary discretion can be exercised only by the persons to whom it is given; even the Court cannot exercise it. The testator may also say that the discretion shall be exercised at a particular time; and I think he does so here by fixing the time when the fund is to become divisible. Again, you must consider who are the objects of the discretion; they must be persons in existence at the time when the discretion is exercised; the discretion cannot be exercised for the benefit of a dead person.

Now, the gift here is from and after the death of the tenant for life, for the benefit of her children, to do that which the executors might think most to their advantage. I think that gives the fund to the executors to divide among the class of children who survive the tenant for life. The Court is performing the office of the executors, and must give it to the same persons.

Then the testator says to his executors, "You may give it amongst that class as you think fit." That does not create a joint tenancy, because his meaning clearly is, that the executors are to divide the fund; and the Court, standing in their place, must also divide it, that is, give it to the objects of the testator's bounty as tenants in common.

Solicitors: Mr. *A. E. Briant;* Messrs. *Fielder & Sumner.*

(1) 8 Ves. 561.

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Mar. 7, 8.

Will—Devise to A., then to B. for Life, then to "my surviving Brothers."

Devise of residue to testator's wife for life, then to his daughter *A.*; upon her decease equally between his surviving brothers and sisters and those of his wife. The testator's wife and daughter survived him, but the daughter predeceased the widow. Some of the brothers and sisters predeceased the daughter; the others survived her, but predeceased the widow:—

10 Eq 254,
11 Eq 529,

Held, that the words "surviving brothers and sisters" referred to those who should survive the last living tenant for life, and that, in the events that happened, there was an intestacy.

JAMES HOWARD, by will, dated the 3rd of February, 1836, disposed of his real estate as follows:—"I give to my wife all that messuage and premises wherein I now reside, and also all my real estate. Also I appoint my wife executrix, and *Thomas Collins* and *John Williams* executors, of this my will. I also, at the decease of my wife, give and devise all the aforesaid premises unto *Ann* my daughter; upon her decease my executors to have full power to make sale of the same and divide the produce equally between my surviving brothers and sisters and those of my wife."

The testator died in 1836, leaving him surviving his wife, his daughter, four brothers and sisters of his own, and one sister of his wife.

The testator's daughter died in 1840, an infant and a spinster; his widow died in 1867.

One of the testator's brothers above referred to, and also his wife's sister, died during the life of the daughter. The rest of the testator's brothers and sisters all died between the death of the daughter and the death of the widow.

The widow having died, the present bill was filed by the administrator of a brother of the testator who died in 1866, against the testator's heir-at-law, who was also heir-at-law of the daughter, and the surviving executor, to have the trusts of the will carried into execution. The heir-at-law demurred.

Mr. *Cadman Jones*, for the demurrer:—

The general rule in *Cripps* v. *Wolcott* (1), that words of survivor-

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(1) 4 Madd. 11.

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ship are applicable to the period of division, applies to this case, and the death of the last survivor of the tenants for life is the period: *Daniell* v. *Daniell* (1); *Spurrell* v. *Spurrell* (2); *Atkinson* v. *Bartrum* (3); *Knight* v. *Poole* (4); *Re Fox's Will* (5). The decision in *Drakeford* v. *Drakeford* (6), which appears to tend the other way, went on the special wording of the will. As there was no survivor living at the death of the widow, there is intestacy.

Mr. *Freeling*, for the bill:—

In *Drakeford* v. *Drakeford* the words "his surviving legitimate children" were held to mean children who survived him. So in the present case "my surviving brothers and sisters" should be read those "who survive me," or else the survivorship should be referred to the death of the daughter, as in *Drakeford* v. *Drakeford*, a construction which is supported by *Ive* v. *King* (7). The provisions for substitution make the cases referred to on the other side distinguishable, and none of them are so close to the present case as *Drakeford* v. *Drakeford*.

Mr. *Cadman Jones*, in reply:—

Ive v. *King* related to a case where the respective shares of members of a class were given over on their dying, in certain circumstances, to the survivors of the class. In such a case the survivorship as to each share is referred to the time of its going over. But this has no possible application to a case where a single period of survivorship must be fixed with regard to the whole fund. The modern authorities are all strong against referring words of survivorship to the death of the testator.

Mar. 6. LORD ROMILLY, M.R.:—

I am of opinion that the cases on this subject are conclusive, and that the word "surviving" in this will means persons who should survive the last living tenant for life. It makes a little

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(1) 6 Ves. 297.
(2) 11 Hare, 54. 17 Jur 755
(3) 28 Beav. 219.
(4) 32 Beav. 548.
(5) 35 Ibid. 163. 11 Jur N S 57
(6) 33 Ibid. 43.
(7) 16 Beav. 46.

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confusion to say—those who survive the survivor of the tenants for life, but in fact that is what it amounts to. The testator in this case gives the first estate for life to his wife, and then after her death he gives the estate for life to his daughter, expecting, reasonably enough, that his daughter would survive his wife, and then he gives the whole of the property in these words: "to my surviving brothers and sisters and those of my wife." I have been hesitating a little upon the words, "my surviving brothers and sisters," but I am clear they cannot mean, particularly as the brothers and sisters of the wife are included, the persons who survive the testator.

This case is not touched by *Drakeford* v. *Drakeford* (1), in which I held that the words "his surviving children" meant the children who survived their father, though his death did not prove to be, as the testator had expected, the period of distribution. That case turned upon a different principle. Here the words must mean those who survived the last living tenant for life. The testator evidently assumed that the estate for life of his daughter would follow the estate for life of the wife. I am of opinion, therefore, that the case is covered by the authorities, and that the persons intended to take were those who should survive the widow of the testator. She, unfortunately, survived the whole class; the consequence is, that there is an intestacy, and the demurrer must be allowed.

Solicitor: Mr. *P. W. Lovett.*

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(1) 33 Beav. 43.

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Jan. 15:
Feb. 8.

RICHMOND *v.* NORTH LONDON RAILWAY COMPANY.

Railway Company—Vendor and Purchaser—Compulsory Powers—Notice to treat—Time within which Powers may be exercised—Delay.

17 Eq 146-9
22 LD 303
35, 40-58

Where a railway company with compulsory powers under their Act for the purchase of land, to be exercised within a prescribed period, serve a notice to treat on a landowner, they must, in order to exercise their powers, come to an agreement with the landowner, or ascertain the price to be paid to him, within reasonable time—that is, within the period fixed by the Act for the completion of the line; and when that period has expired without any step being taken beyond the service of the notice and the claim by the owner, the powers of the company to take the land under the notice cease to be operative.

A railway company with an Act limiting the time for the exercise of the compulsory powers to four years, and the time for the completion of the line to five years from the passing of the Act, served a notice to treat within the four years on landowners, whose claim for compensation was not assented to. Nothing further was done till after the five years had expired, when the company claimed to proceed under the notice. The landowners filed a bill to restrain the company from taking the land under the notice:—

Held, that the company could not then proceed under the notice.

affd by L.C. 3 Ch 679

THE Plaintiffs were owners of a public house and premises in *Shoreditch*, which the Defendants were empowered to take for the purposes of their railway.

There were two Acts under which the Defendants had compulsory powers to take lands, including the Plaintiffs' property,—the one passed on the 22nd of July, 1861, and the other on the 17th of June, 1867. The question in the case was whether, under the circumstances, the Defendants were now entitled to take the property under the provisions of the first Act.

The 41st and 42nd sections of the first Act, called the *City Branch Act*, 1861, provided as follows: "The powers of the company for the compulsory purchase of land for the purposes of this Act shall not be exercised after the expiration of four years from the passing of this Act.

"The railway hereby authorized shall be completed within five years after the passing of this Act, and on the expiration of that period the powers of this Act shall cease to be exercised, except as to so much thereof as shall then be completed."

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On the 5th of January, 1863, notice was given to the Plaintiffs by the Defendants that they required to take the property, under the *City Branch Act*, 1861. In answer to this notice the Plaintiffs sent in a claim for £3000, which was not assented to. In March, 1864, as no further step had been taken by the Defendants, the Plaintiffs' solicitor wrote to the Defendants' solicitor, and inquired whether the Defendants intended to take the property, and received an answer that they would require it, and insisted on the notice they had given. No further step was taken till the 12th of January, 1865, when the Defendants offered £750 for the value of the property, and 10 per cent. on this for the compulsory sale. This offer was not accepted. In the meantime the lease under which the property was let determined.

On the 22nd of July, 1865, the time prescribed by the Act for taking the property expired, and on the 22nd of July, 1866, the five years within which, under the 42nd section, the railway was to be completed, also expired.

In January, 1867, after the completion and opening of the railway, the Plaintiffs, who were trustees, obtained an order under the *Leases and Sales of Settled Estates Act*, for granting a lease of the property to Sir *H. Meux & Co.* for forty years, at the annual rent of £80, being a considerable increase upon the rent of the former lease, which expired in 1863. The lease was accordingly granted.

On the 17th of June, 1867, the Defendants' second Act, the *North London Railway Act*, 1867, was passed, with compulsory powers to take the property in question.

On the 27th of September the Defendants' solicitors wrote to say that they were instructed to get the amount of the purchase-money fixed, and requested the Plaintiffs not to create a fresh tenancy. To this an answer was sent on behalf of the Plaintiffs, stating that the property had been leased, and that the company must settle with the lessees.

The Defendants insisted on their notice of the 5th of January, 1863, and the Plaintiffs accordingly filed their bill, alleging that the Defendants were not now entitled to act upon the notice of the 5th of January, 1863, as the Defendants could not now use the property in question for any of the purposes of the *City Branch*

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Act, 1861, and that none of the powers given by that Act could now be exercised, except as to such parts of the railway thereby authorized as had been completed, which did not include the premises.

The bill prayed that the Defendants might be restrained from proceeding upon the notice to treat of the 5th of January, 1863, and from taking any step to assess the compensation to be paid to the Plaintiffs by virtue of such notice, or from taking any other proceedings to take possession of the premises, unless and until a proper notice to treat should have been given to the Plaintiffs under the *North London Railway Act*, 1867.

Mr. *Baggallay*, Q.C., and Mr. *Freeling*, for the Plaintiffs :—

The Defendants, by taking no step to complete the contract for the purchase of the property till after the expiration of the five years within which the line was to be completed, are now precluded from acting on the notice of the 5th of January, 1863. The mere fact of serving the Plaintiffs with a notice, and of the claim being thereupon made by the Plaintiffs for compensation, does not, as the claim was not acceded to, constitute a complete contract. It would not be sufficient for the conversion of the property. Thus, in the case of *Re Arnold* (1), where Commissioners, having compulsory powers to purchase lands, served a notice upon the owner, and he, in reply, stated the price that he was willing to take, but died before the acceptance of the offer, and the purchase was afterwards completed at that price, it was held that the land had not been converted into personalty at the death of the owner. Your Lordship, in that case, referred to the decision of Vice-Chancellor *Kindersley* in *Haynes* v. *Haynes* (2), where it was held that a mere notice to treat, if nothing more was done, did not constitute a contract by the owner for the sale of his property. In *Hedges* v. *Metropolitan Railway Company* (3) your Lordship held that notices by railway companies to take lands could not be put higher than contracts, and that after great delay in proceeding on such contracts, they must be considered as abandoned. If there had been a binding contract, it could, no doubt, have been enforced

(1) 32 Beav. 591. 6 Jur NS 1275 (2) 1 Dr. & Sm. 426. 7 Jur N S
(3) 28 Beav. 109.

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after the compulsory powers had ceased, but there was no binding contract at all, and if there were, it would only be binding for the purposes of the Act of 1861; and there is nothing to shew that it was necessary for the purposes of that Act, for the line has been opened, and the lands were not taken. In *Flower* v. *London, Brighton, and South Coast Railway Company* (1), where a company had power under their Act to take land as "they might think necessary" for the purposes of the Act, it was held that, if the power was to be enforced, the purposes must be specified, that the Court might judge whether the land was *bonâ fide* required.

Mr. *Southgate*, Q.C., and Mr. *E. Rodwell*, for the Defendants:—

The Plaintiffs are not entitled to come to this Court for an injunction. They should first have the value of the land assessed, and then take the objection at law. They took no step to obtain the completion of the contract after putting in their claim, and having failed to do so in reasonable time they cannot now complain: *Watson* v. *Reid* (2). The Plaintiffs were bound to do some act to shew that they considered the negotiation as still pending.

Further, we contend that a notice to treat by a company within the time prescribed by their Act constitutes a contract. In *Marquis of Salisbury* v. *Great Northern Railway Company* (3) it was held that where a notice had been so given the steps necessary to complete the purchase might be taken after the expiration of the time prescribed by the Act; and in *Reg.* v. *Birmingham and Oxford Junction Railway Company* (4) the same principle was recognised. The company must, undoubtedly, complete their contract within a reasonable time, as was laid down in *Baker* v. *Metropolitan Railway Company* (5), and in *Thicknesse* v. *Lancaster Canal Company* (6), where no time was specified for the completion of the works, but that has not in this case been exceeded, and the Court cannot interfere by injunction to prevent the Defendants from asserting their legal rights.

In this case there has been no waiver on the part of the Defen-

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(1) 2 Dr. & Sm. 330. 11 Jur NS 406
(2) 1 Russ. & My. 236.
(3) 7 Railw. Cas. 175.
(4) 6 Railw. Cas. 628.
(5) 31 Beav. 504; 9 Jur NS 61.
(6) 4 M. & W. 472.

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dants. We admit that a company cannot hold the notice for ever over the head of a landowner, but the obligation is reciprocal, and the landowner has power, if he wishes, to compel the company to waive the contract: *King* v. *King* (1); *Pinchin* v. *London and Blackwall Railway Company* (2). In *Metropolitan Railway Company* v. *Wodehouse* (3), an injunction was granted to restrain a landowner from selling lands in respect of which he had been served with a notice to treat.

We submit that there has been no unreasonable delay on the part of the company, and that they are not precluded from insisting on their rights under their first notice to treat.

Mr. *Baggallay*, in reply, referred to *River Dun Navigation Company* v. *North Midland Railway Company* (4), in which it was held that the Court will interfere by injunction where it is clearly shewn that a public company is exceeding its powers.

Feb. 12. LORD ROMILLY, M.R.:—

The Plaintiffs' property is required by the Defendants for the purposes of their railway. They have authority to take it under two Acts, one of which passed in July, 1861, and the other in June, 1867.

The Defendants insist that they are entitled to take the property under the powers conferred on them by the Act of 1861. The Plaintiffs contend that they are unable so to do, and that they can only take it under the powers conferred on them by the Act of 1867.

At first sight it would appear to be of little importance whether the property was to be taken under one Act or under the other, as the value must be assessed at the time of taking the property, and as the Plaintiffs cannot prevent the Defendants from taking it. It is, however, in this case a matter of considerable moment, as upon the decision of it depends the determination of the question upon whom does the duty lie of settling the compensation payable

(1) 1 My. & K. 442.

(2) 1 K. & J. 34. 1 Jur N.S. 39

(3) 5 N. R. 463.

(4) 1 Railw. Cas. 135.

to the lessees of the public house to whom a demise has been made by the Plaintiffs since the passing of the first Act.

The facts which raise this question are very few, and are not in dispute. I cannot discover that the question has hitherto been the subject of any guiding decision. The dates are the only matters of importance:—[His Lordship then stated the facts of the case.] An objection was taken by the Defendants' counsel to the frame of the suit, insisting that the Plaintiffs could not properly file a bill in such a case, and that they must wait for the question of value to be assessed by the jury and take the objection at law, but I think the Plaintiffs are not in error in this respect.

Assuming that the company are about to exceed the powers given to them by the Legislature, it is the right of any person who will be damnified thereby to come to this Court for an injunction. *River Dun Navigation Company* v. *North Midland Railway Company* (1), seems to me to establish this proposition, which is also consistent with all principles of equity. I think, therefore, that the question is fairly open on the facts before me, and must be now decided.

The case, in my opinion, must be treated exactly as if the second Act had not passed, and the question then resolves itself into this:—within what time after notice duly given of their intention to take the land can a railway company avail itself of the compulsory powers conferred upon it to take the land included in the notice?

It is conceded, and as I think, very properly, that they can do so at any time before the period fixed by the Act for the completion of the line of the railway has expired; but it is argued that when this period of time has expired, as the company cannot make the line without violating the provisions of an Act of Parliament, their powers of taking land compulsorily for that purpose, although under a regular notice given in proper time, must expire also. It is, however, to be observed that the Act which limits the time for completing the line is not prohibitory, it does not say that the line shall not be completed after the day fixed, but it merely suspends all the powers given by the Legislature up to that period.

No one could properly argue that if all the land had been bought, and the line formed, but not completed, prior to the time prescribed by the Act—the company, who did not by completing the line interfere with the rights or property of any other person, could be restrained from completing the line of railway so formed. But, admitting that observation to be correct, it does not govern this question, and there is considerable force in the argument that, as the time given by the Legislature for making the line expires on a particular day, it follows that they cannot take proceedings under the powers given by the Act to enforce the purchase of land of which due notice to take has previously been given, inasmuch as they can only take land required for the railway, the construction of which the Legislature has stopped, after which it is argued that they are in the same position as if the Act had not passed at all.

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(1) 1 Railw. Cas. 135.

Of course, if there had been a completed agreement between the railway company and the landowner, the argument would not apply; but in this case it is either admitted, or cannot be denied, that no such contract was completed. It is quite settled that a notice by the railway company to take the land does not by itself create a contract, and that it does not alter the character of the property until some further act has been done, which has not taken place in the present case.

It is also, I think, clear that the notice given by the railway company to the landowner cannot operate for an indefinite time: it must be acted upon within a reasonable time or it must be deemed to be abandoned. The difficulty is to determine what period of time is to be considered to be reasonable.

Suppose, for instance, that, in the present case, no subsequent Act having passed, the Defendants had waited for ten years without taking any definite step for ascertaining the value of the land, could it be argued that such a notice as that given in January, 1863, would be binding on the landowner in January, 1873?

The injury to him would be very great. During the whole of the ten years he would have had but a qualified ownership or enjoyment of his own property. If land, he could not improve it or build on it; if a house, he could not rebuild or repair it, however urgent the necessity of doing so might be, without the strong probability of getting no return for the money so laid out if the

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company ultimately took the land. But, what is still worse, if the property should happen to be unlet at the date of the notice, or should become so shortly afterwards, he could not relet it without entailing on himself the necessity of compensating the new tenant, with whom the company would have nothing to do; and the experience of compensation cases, as well as the institution of this suit, shew that the necessity imposed on the railway company of settling with the lessees separately is highly beneficial to the landlord. In fact, in such cases the landlord, after receiving a notice from the railway company, would be compelled to introduce into the contract of demise with the lessee some stipulation regulating the amount of compensation to be given to him in the event of the railway company acting upon the notice they had given. In addition to which, few good tenants could be found if they believed that they were liable to be turned out in the course of a short time. I think it clear, therefore, that this suspense cannot be held over the head of a landowner for an indefinite, or, in other words, an unreasonable period of time.

The Defendants insist that the evil arising from the doubt and uncertainty of the landowner as to whether the company intend to take the land might be easily removed by application to the company, and an inquiry made to ascertain what their intentions were; but the answer to this is—what is to be done by the landowner in case the railway company constantly return for answer that they intend to act on their notice, and yet in fact do nothing? In this case four-and-a-half years have elapsed from the date of the notice, and yet nothing effectual has been done by the company towards ascertaining the value of the land.

What follows from this state of circumstances? It is obvious that the notice is not to be operative for ever: it follows, therefore, that some limit must be put to the time within which it is to be operative: it further follows that this limit of time must be a reasonable limit of time: and that again resolves itself into the answer to be put to the question, with which the Courts of law have so often and in such a variety of cases to deal—what is a reasonable limit of time as applicable to the class of cases in question?

The only principle that I can discover which can have any

22 Ch. D 52

fixity about it is to limit the time within which, after giving the notice to treat, the railway company must come to an agreement with the landowner, or must ascertain the price to be paid to him, to the period fixed by the Legislature for the completion of the line. Anything other than this is mere uncertainty, and would vary in every case, according to the fancy of the Judge. It is obviously inequitable to permit the railway company for an indefinite time to keep this notice over the head of the landowner, fettering his enjoyment of his property, and it is no answer to say that the landowner might insist on the railway company ascertaining the price, for if that were true the rule of the Court, if it can be laid down, ought to apply to every case, and would include that of the landowner who desires to keep his land, and not to part with it for any price, if he can help it.

I think, also, that this rule would not bear hardly on railway companies. It is not unreasonable to compel the company to bind themselves to take the land and to bind the owner also before the time for making the railway has expired, and this appears to me to be the proper and, indeed, the only time that can be fixed within which the notice to be given by the railway is to be considered to be operative. If the company allow this time to expire they must in that case, as in the present, apply for and obtain from the Legislature new powers in the place of those which have expired, but if they do so they must take the property under the powers contained in the new Act of Parliament. I am of opinion, therefore, in this case, that the Defendants cannot proceed under the notice of January, 1863, but that they must proceed under the power contained in the Act passed last session.

I will make a declaration to that effect, and this probably will be sufficient, giving the parties liberty to apply in case of any violation of it. As this suit, judging from the correspondence, appears to have been instituted and defended for the purpose of trying this simple question, the costs must follow the event.

Solicitors for the Plaintiffs: Messrs. *Hunter, Gwatkin, & Hunter*.
Solicitors for the Defendants: Messrs. *Paine & Layton*.

BROOKS *v.* SUTTON.

M. R.
1868
March 5, 6.

Pleading—Bill for Account—Plea of Release—Non-production of the Accounts impeached—Insufficiency.

A plea of release to a bill for an account is insufficient unless it sets out by way of averment the accounts which form its consideration.

To a bill by a *cestui que trust* against the trustees of a testator's estate seeking to set aside a release which he alleged had been improperly obtained from him, and the recitals of which he alleged to be untrue, and praying for the administration of the estate and the usual accounts and directions, the Defendants, as to so much of the bill as sought to have the estate administered and for an account, pleaded the release which they therein set forth, with its recital that true and correct accounts had been rendered, but they set forth no statement of the accounts in question, and answered the rest of the bill:—

Held, that the plea must stand for an answer, with liberty to except.

THIS case came before the Court on a plea and answer.

The suit was instituted for the administration of the real and personal estate of a deceased testator. The Plaintiff was the heir-at-law and one of the next of kin of *Mary Kirtland*, who was one of the persons beneficially interested under the will. The Defendants were the representatives of the deceased trustees and executors of the will.

The bill alleged that the deceased trustees had been guilty of wilful neglect and default in respect of the testator's estate, that the Defendants had received the rents of the real estate since the death of the last surviving trustee, but that they had not, nor had the trustees in their lifetime, given to the Plaintiff or to *Mary Kirtland* the opportunity of examining any account of the testator's estate.

The bill stated that by a deed-poll, dated the 14th of December, 1857, executed by the Plaintiff and the other *cestuis que trust*, they respectively purported to release the trustees from all actions, accounts, claims, and demands, on account of the real or personal estates of the testator; but the bill alleged that the deed-poll was obtained from the Plaintiff improperly, by undue influence and without proper advice, and that the recitals were not true. There was no other allegation that the accounts of the trustees were incorrect.

The bill prayed a declaration that the deed-poll was not binding on the Plaintiff, and that it might be set aside; that the trusts of the will might be carried into execution, and the estate, real as well as personal, administered under the direction of the Court; that special accounts and inquiries might be directed; and for consequential relief.

The Defendants, by their plea and answer, as to so much of the bill as sought that the trusts of the will might be carried into execution and the estate administered under the direction of the Court, and for the accounts and inquiries therein prayed for, pleaded the execution by the Plaintiff of the deed-poll of the 14th of December, 1857, which was set forth, and which recited that the trustees had made out a full and correct account of all moneys which had come to their hands as trustees and executors, which had been examined and approved by the said *Mary Kirtland*, and the Defendants averred that all the recitals and statements contained in the deed-poll were true, and the accounts mentioned therein were true and just accounts, and denied the charges made by the bill as to the mode in which it was obtained from the Plaintiff; and the Defendants pleaded the deed-poll and the release thereby made in bar to so much of the bill as was thereinbefore pleaded to, and to all the relief and discovery sought thereby, and prayed to be dismissed in respect thereof, and the Defendants answered so much of the bill as sought to set aside the deed, but they did not set forth any statement of the accounts of the testator's estate.

Mr. *Southgate*, Q.C., and Mr. *Bovill*, for the Defendants, contended that the plea was sufficient.

Mr. *Andrew Thomson*, for the Plaintiff:—

The plea of the alleged release by the Plaintiff is insufficient without a statement of accounts. The essence of the consideration for a deed of release is the fairness of the accounts; and where the accounts are impeached it is essential in pleading the release that all the circumstances should be set forth by averments shewing the fairness of the consideration. In *Mitford* on Pleading (1) the rule is thus stated: "A plea of a release cannot extend to a dis-

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(1) 5th Ed. p. 305.

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covery of the consideration, and if that is impeached by the bill, the plea must be assisted by averments covering the grounds on which the consideration is so impeached:" and in reference to a plea of a stated account (1): "If the bill charges that the Plaintiff has no counterpart of the account, the account should be annexed by way of schedule to the answer, that if there are any errors upon the face of it the Plaintiff may have an opportunity of pointing them out." The same principle applies to a plea of release.

In *Salkeld* v. *Science* (2) a plea of release as to accounts further and other than the plea set forth was held to be incorrect, and the plea, though not overruled, was ordered to stand for an answer. In *Roche* v. *Morgell* (3) a plea of release to a bill for an account and discovery with an averment that the release was freely executed and without fraud, was ordered to stand for an answer, with liberty to except. The absence of a direct allegation, which there was in *Roche* v. *Morgell*, of the incorrectness of the accounts, does not render that case inapplicable to the present, for here the bill alleges that the recitals were untrue, and one of the recitals stated in the plea is, that full and correct accounts were furnished. Besides, in considering the sufficiency of a plea the Court will take the allegations in the bill less strongly against the Plaintiff than in an argument on demurrer: *Rumbold* v. *Forteath* (4).

[The Master of the Rolls:—Could you not by taking out a summons for the production of documents obtain the accounts?]

The Plaintiff is precluded by the plea from taking such a course, and until that is disposed of he can take no further step: *Darnell* v. *Reyny* (5).

Mr. *Southgate*, in reply:—

It is not necessary to set out the accounts in a plea when they form the consideration for the release pleaded. "A plea of a stated account is a good bar to a bill for an account:" *Mitford* on Pleading (1). An averment as to the nature of the consideration is unnecessary, and the plea and answer in this case are, we submit, well pleaded.

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(1) 5th Ed. p. 302.
(2) 2 Ves. Sen. 108.
(3) 2 Sch. & Lef. 721.
(4) 2 Jur. (N.S.) 686.
(5) 1 Vern. 344.

2K-1748

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Mar. 6. Lord Romilly, M.R.:—

I am of opinion that the plea is insufficient, and must stand for an answer, with liberty to except, on these grounds:—In the first place, I doubt whether a release can ever be pleaded without setting forth the accounts therein referred to. Lord *Redesdale's* observations in *Roche* v. *Morgell* (1) are just and accurate, that "if the accounts were fairly adjusted the release was fair, and was a bar to the relief sought by the bill to the time of the settled account, that is, the release would preclude the Court from decreeing that the parties should come to a new account upon the same subject; but if the accounts were not fair, if they were liable to all the imputations cast on them by the bill, then the release was not a fair transaction, and ought not to preclude the Court from decreeing a new account." The question in every case is, were the accounts taken fairly on the release, and has the Plaintiff a right to go into that question after the release is given? I think he has, and I think the mere fact that there was no allegation impeaching the accounts does not preclude him from going into this question. The plea covers so much of the bill as seeks that the trusts of the will may be carried into execution and the estate administered under the direction of the Court, and for the accounts and inquiries therein prayed for. One of two things is certain, either that under the answer to this bill the Plaintiff can get a copy of the accounts, or he cannot. I will assume, in the first place, that he can get a copy of the accounts, and that, on the accounts being delivered, he finds they are full of erroneous and improper charges, which he can prove. Then if the plea which covers the account has been allowed, it follows that no account can be directed, notwithstanding the errors. Then, supposing the Plaintiff does not get the accounts shewn to him, is he, because he cannot point out specifically errors in accounts which he cannot see, to be precluded by a plea of release from any inquiry or examination into the matter? Lord *Redesdale*, in *Roche* v. *Morgell*, did not make the discovery depend on the allegations in the bill that these things were false, because they could be denied, but considered that the Plaintiff was entitled to the discovery; and

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(1) 2 Sch. & Lef. 726.

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I am satisfied that in every case the person who contests the release is entitled to have the discovery of the accounts on which the release is based, with this liability, that if he does not set it aside on the evidence, he will have to pay all the costs. But whether the Plantiff can obtain the accounts or not, I am of opinion that if this plea were allowed the Court would be involved in inextricable difficulties in the further progress of the suit. I must, therefore, direct that the plea stand for an answer, with liberty to except.

Solicitor for the Plaintiff: Mr. *H. A. Sherwood.*
Solicitor for the Defendants: Mr. *W. Carpenter.*

In re MARLBOROUGH CLUB COMPANY.

M. R.
1868
March 7, 9.

Company—Contributory—Paid-up Shareholder—Companies Act, 1862, *ss.* 74, 101.

A holder of fully paid-up shares in a company, although indebted to the company, cannot be put on the list of contributories.

11 Eq [illegible]
20 Eq 589
590-51
23 Ch D 514
519

THE *Marlborough Club Company, Limited,* was incorporated under the *Companies Act,* 1862, for the purpose of forming and carrying on a club house in the county of *Middlesex,* under rules and regulations to be approved of by the company. By the articles of association the directors were empowered to make byelaws, rules and regulations for the government of the house. Rules were accordingly made, which provided that every member of the club should hold at least one share in the company, and should pay a certain annual subscription thereby fixed.

In November, 1866, the company was ordered to be wound up.

The official liquidator proposed to settle a supplemental list of contributories containing the names of holders of fully paid-up shares who were indebted to the company for arrears of their annual subscriptions, and for small sums in respect of refreshments, &c., furnished by the club; and an application was now made to the Court for that purpose.

Sc as to costs 6 Eq 519

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1868
In re
Marlborough
Club Co.

Mr. *Cracknall*, for the official liquidator:—

If this application is granted the official liquidator will be able to obtain balance orders against these contributories in respect of their debts: *Companies Act*, 1862, s. 101; and thus the realization of the assets will be facilitated. These shareholders may be put on the list for two reasons: 1. A holder of fully paid-up shares is a contributory within the meaning of the *Companies Act*, 1862: *In re National Savings Bank Association* (1); *In re Anglesea Colliery Company* (2). 2. The sums for which it is sought to make these shareholders liable are payments due from them as members of the company; in respect of these the shareholders are liable to contribute to the assets of the company, and they are therefore contributories within the definition contained in sect. 74 of the *Companies Act*, 1862. [He referred to *Cox's Case* (3), decided upon the 66th section of the *Winding-up Act*, 1848.]

Mr. *Marten*, for the shareholders:—

The sums for which the shareholders are sought to be made liable are small, and might be much more readily recovered in the County Court. Each case must ultimately be decided on its own merits, and therefore no expense will ultimately be saved by settling these gentlemen on the list of contributories.

The question must be decided quite independently of sect. 101, which only enables the Court to make an order on a person already settled on the list of contributories. Now it is an entirely novel proposition that a holder of fully paid-up shares can be placed on the list. He is, no doubt, a contributory in this sense, that where the company is solvent, and it is necessary to adjust the rights of the shareholders, he may apply to the Court for that purpose; but it is a very different thing when the company is insolvent, and he disclaims all interest in the assets. The holder of fully paid-up shares may be benefited thereby, but cannot be made subject to any liability: *Leifchild's Case* (4); *Lindley* on Partnership (5).

As to the shareholders being liable to contribute these sums to

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(1) Law Rep. 1 Ch. 547. 12 Jur. N.S. 697

(2) Ibid. 555. 12 Jur. N.S. 696

(3) 3 De G. & Sm. 180.

(4) Law Rep. 1 Eq. 231. 11 Jur. N.S.

(5) Vol. ii. p. 1302, 2nd Ed.

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the assets of the company, the same thing might be said of any ordinary debtor of the company.

Mr. *Cracknall*, in reply.

Mar. 9. LORD ROMILLY, M.R.:—

This is an application of a perfectly novel description. It is an application by the official liquidator of a company to settle a supplemental list of contributories, for the purpose of enabling him to obtain payment of debts due from contributories of the company. The persons sought to be put on the list are holders of fully paid-up shares, and are only sought to be made contributories for the purpose of giving the Court jurisdiction over them as debtors to the company.

Now, the Court is not in the habit of settling a supplemental list and I find nothing in the Act which enables a supplemental list to be made. On the contrary, the 101st section shews that persons on whom orders are made under it must be already settled on the list. Unquestionably these gentlemen could not be settled on the list in the first instance, and I cannot put them on solely to give the Court jurisdiction to enforce payment of the debts due from them. The liquidator must recover these debts in the County Court in those cases where the sums are small, and where they are large he must bring actions in the usual way.

Solicitors: Mr. *Turnley*; Messrs. *Mason, Sturt, & Mason.*

M. R.
1868
March 9, 10, 13.

8 Eq 190
9 Eq 700
13 Eq 531,
20 Ch D 141

In re SHIELDS MARINE INSURANCE ASSOCIATION.

LEE AND MOOR'S CASE.

Unregistered Company—Winding-up—Contributory—Guarantee for Contributions of Member—Companies Act, 1862, s. 200.

The rules of an unregistered mutual marine insurance company provided that where any ship insured with the company was mortgaged, the mortgagee should give a guarantee for the payment of all averages and contributions due or to become due in respect of the ship:—

Held, that a mortgagee who had given such a guarantee to the company was not a contributory within the meaning of the *Companies Act*, 1862, s. 200.

THIS was an application by the official liquidator of the *Shields Marine Insurance Association* to place the names of *Thomas Lee* and *William Moor* on the list of contributories.

The association was a mutual marine insurance society, which was originally formed in 1855, but had never been registered under any Act of Parliament. Its affairs were managed by a committee elected annually on the 20th of February. By the rules of the society the committee had power to settle and adjust all averages and total losses, and all disputes amongst the members relative to their insurances; to order payment of all losses so settled; and to bring actions against members who neglected or refused to pay their proportions thereof.

A shipowner might become a member at any time upon making a proper application to the committee; and on being admitted a member he was entitled to the benefit of his insurance, and liable to contribute to the losses of other members, up to the 20th of February following. All persons being members on the 20th of February in any year, and who had strictly complied with the rules of the society, were entitled to renew their insurance for another year from that time. In case of the sale of a ship, the assured was to remain no longer insured, and, after notice thereof delivered to the secretary, no longer liable to others. When any ship was mortgaged, the mortgagee was required to give a guarantee for the payment of all averages and contributions due or to become due in respect of the ship.

On the 3rd of August, 1858, *Thomas Lee* proposed, by a letter addressed to the committee, to insure with the association a ship belonging to him named the *Harriet*, at the sum of £600: and this proposal was accepted in writing by two members of the committee on behalf of the others. The letter and acceptance were not stamped as a policy of insurance, nor was any formal policy ever executed by *Lee*.

Shortly afterwards *Lee* mortgaged the ship *Harriet* to *William Moor* for £500. On the 21st of August, 1858, *Moor* addressed a letter to the members of the association, whereby he agreed to guarantee and become responsible to them for the payment of all sum and sums of money then due and owing, or which at any time might become due, for all losses and damages which might occur whilst the *Harriet* should continue insured in the association, and which might be drawn upon *Thomas Lee*, for premiums or otherwise, through the medium of the committee of management or the secretary for the time being, in respect of the insurance of the said vessel: Provided always, that in every instance of moneys so drawn, or to be drawn as aforesaid, due demand should be made upon the said *Thomas Lee* for payment of the same in the first place as might be customary in the association.

In February, 1859, the insurance was renewed, in accordance with the rules of the association, for a year from the 20th of that month.

In May, 1859, the ship was sold. Notice of the sale was duly given to the secretary on the 9th of that month.

General meetings of the association were held and committees of management elected in 1860, 1861, and 1862, but not subsequently; and no insurance in the association was renewed on the 20th of February, 1863.

On the 25th of June, 1864, an order was made for winding up the association under the *Companies Act*, 1862. This order was afterwards discharged as being irregular, and another order to the same effect made in December, 1867.(1)

It was alleged that a considerable sum was due to the association from *Lee* and *Moor* in respect of the insurance on the *Harriet*, and a summons was taken out by the official liquidator for the purpose of placing them on the list of contributories as from the

(1) See 2 W.N. 265, 296

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4th of August, 1858, to the 9th of May, 1859. This application was opposed by *Moor* on very many grounds, amongst which may be mentioned the following:—1. That the application to the committee not being stamped as a policy of insurance, could not be given in evidence; 2. That a mutual assurance society was not a company which could be wound up under the *Companies Act*, 1862; 3. That the association was dissolved in every year on the 20th of February, and a new company formed, and that on the 20th of February, 1860, the association of which *Lee* and *Moor* were members ceased to exist; 4. That *Moor* was merely a surety for the payment of *Lee's* contributions, and was not a contributory within the *Companies Act*, 1862, s. 200 (1). The case was decided on the last ground, and to it the present report is confined.

Lee did not appear; and it was stated at the Bar that he had become a bankrupt since the summons was taken out.

Mr. *Southgate*, Q.C., and Mr. *Marten*, for the official liquidator:—

The guarantee was not given by a stranger, but by the mortgagee of the ship in pursuance of the rules of the association. The insurance was effected with his privity and for his benefit: he is liable on the guarantee to pay *Lee's* contributions: and these contributions are payments "for the adjustment of the rights of the members among themselves:" *Companies Act*, 1862, s. 200.

Mr. *Jessel*, Q.C., and Mr. *Haddan*, for *Moor*:—

Moor is simply a debtor of the association: he is not a contributory. The adjustment of the rights of members amongst themselves refers to a case where a member has, for some reason or other, paid more than his share.

Mr. *Southgate*, in reply:—

Assume that all the debts of the company are paid: *Lee* has contributed nothing towards payment of them, and therefore others must have paid more than their share. Is not that a case for the adjustment of the rights of members between themselves?

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(1) The material part of this section is as follows: "In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay, or contribute to the payment of, any debt or liability of the company, or to pay, or contribute to the payment of, any sum for the adjustment of the rights of the members amongst themselves, or to pay, or contribute to the payment of, the costs, charges, and expenses of winding up the company."

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Mar. 13. Lord Romilly, M.R.:—

This is a case in which several questions of considerable importance and nicety have been argued before me, but I do not think it necessary to decide any of them except one, for the purpose of determining the particular point before me. In my opinion Mr. *Moor* is not a contributory of the company under the words of the Act.

I assume that this association is a company within the meaning of the Act. That was one of the questions argued before me: it was also contended that it was a fresh company every year, as to which, also, I do not think it necessary to decide anything. The society was for the mutual insurance of vessels: and if a member mortgaged his vessel, then the mortgagee was required to enter into an undertaking, by way of suretyship, that the member of the company should pay what was required of him. One of the members of the company was Mr. *Lee*, who had a ship called the *Harriet*, which he mortgaged to Mr. *Moor*. When the mortgage was made, *Moor* entered into and signed the document of suretyship, which was as follows:—[His Lordship read it.] In my opinion this agreement constitutes nothing more than a contract of suretyship; *Moor* undertakes that he will pay for *Lee* that which is due to the association, and which *Lee* himself does not pay. Now, the question is, whether he is a contributory within the meaning of the Act. That depends upon the construction to be put upon the 200th section of the statute, which relates to the winding up of unregistered companies. Now, there are three states of things, one of which is required to be fulfilled in order to make a person a contributory. First, he must be "liable at law or in equity to pay, or contribute to the payment of, any debt or liability of the company." It is quite clear that *Moor* is not so liable. Again, the last requisite is that he is liable "to pay, or contribute to the payment of, the costs, charges, and expenses of winding up the company." It is also quite clear that he is not liable for that. The only question is, whether he is

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liable for this, which is second: "To pay, or contribute to the payment of, any sum for the adjustment of the rights of the members amongst themselves."

It is contended upon those words that you cannot "adjust the rights of the members amongst themselves" until you have got all the money which is due to the company paid in, because the rights of the members amongst themselves can never be ascertained till you know what amount of money they have to receive, and that, therefore, anybody who owes money to the association is a person who is "liable to pay, or contribute to the payment of, any sum for the adjustment of the rights of the members amongst themselves." If that be so, it is quite clear that every person against whom the society may have any claim whatever, or from whom any debt whatever is due to the society, is a contributory. I do not think that could possibly have been the intention of the Legislature: and I think it is impossible to give so wide a construction to the Act.

It remains to be considered what is the meaning of the Act. I think it applies to the case where a person who is a shareholder in a company, such as, for instance, one of the mutual insurers in this case, has either from mistake, inadvertence, or, possibly, from the facts not being sufficiently known, received more than his share, and would have something to repay to the other members of the company. Exactly in the same manner, in a company of limited liability, where there are many shares, some of which are paid up, and the rest not paid up, the persons who have paid up in full are not required to be on the list of contributories, but as soon as it is found there are assets more than sufficient to pay all the debts, then calls may still be made on the persons who have not paid up in full, in order to adjust the rights of the shareholders between themselves; and persons are not discharged from all liability as shareholders because all claims against the society have been disposed of, if the society have claims against them for the purpose of setting right the contributions equally amongst the members.

I think that the Act applies to a matter of that description, and that it does not apply to the mere case of a debtor to a company. I am clearly of opinion that Mr. *Moor* was nothing more than a

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debtor to the company, and therefore he cannot be made a contributory under the words of this clause.

The result is, that the summons must be dismissed as against *Moor*. As to *Lee*, I make no order; and I do not think this is a case for giving any costs. It is quite clear there was an original liability on the part of *Moor* to somebody, which has not been discharged. The official liquidator must have his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Pattison, Wigg, Gurney, & King*.

Solicitors for *Moor*: Messrs. *Johnson & Weatheralls*.

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10 Ch. 363.
2 Ch. D. 138

Practice—Motion for reception of new Evidence after Evidence is closed—Subsequent Discovery of material Witness—15 & 16 *Vict. c.* 86, *s.* 38.

After evidence is closed the Court will not, under sect. 38 of 15 & 16 Vict. c. 86, allow new evidence to be received on the ground that a material witness has since been discovered, whose evidence the party who desired that the affidavit of such witness should be filed had no previous means of knowing to be obtainable.

THIS was an application on behalf of the Plaintiff, under sect. 38 of 15 & 16 Vict. c. 86, that certain evidence might be received in the cause after the evidence was closed.

The Plaintiff, who was one of the residuary legatees under a will, and also a specific legatee of certain chattels, filed his bill against the trustees for the administration of the estate, also seeking to make the trustees liable for certain alleged breaches of trust.

The answer was put in and replication filed: the evidence was closed on the 11th of January, 1868.

The Plaintiff's solicitor stated in his affidavit that since the 10th of February he had discovered a most material witness, whose evidence he had no means of previously knowing to be obtainable.

Mr. *W. Pearson*, in support of the motion:—

The Court has jurisdiction, under the 38th section of the Act, to

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enlarge the time for receiving evidence, and the ground stated by the Plaintiff's solicitor is sufficient to justify the Court in granting the application.

In *Boyse* v. *Colclough* (1) an affidavit of facts which had occurred after the time for closing evidence was received at the hearing of the cause, without special leave having been obtained. In *Hope* v. *Threlfall* (2) the Plaintiffs obtained leave to read an affidavit filed after the expiration of the time, on the ground that it was material to their case. In *Scott* v. *Corporation of Liverpool* (3) the Lords Justices affirmed an order of Vice-Chancellor *Stuart* for leave to file affidavits after the time for closing evidence, to meet certain charges made by the Plaintiff's affidavits against the Defendants' witnesses. In *Price* v. *Bostock*, before Vice-Chancellor *Wood* (27th of May, 1858), where, on the publication of evidence, it appeared that the Plaintiff had given evidence of facts not averred by the bill, the Defendants were allowed to file affidavits in answer, but without prejudice to the Defendants' right to object at the hearing that the new evidence was not material to any issue raised. In *Smith* v. *Meadows*, before Vice-Chancellor *Kindersley* (9th of June, 1864), in a suit to carry into execution the trusts of an alleged settlement, the execution of which was denied by the answer, after replication filed, on publication of the evidence, it appeared that the Plaintiff had given evidence of facts shewing that, if the Defendant had not executed the deed, he had done acts shewing that he was bound by it. In that case the Defendant was allowed fourteen days to file affidavits in answer to the Plaintiff's evidence, but the order was without prejudice to the Plaintiff's right to object to the relevancy of the new affidavits at the hearing.

In the present case I submit that, as a material witness has been discovered since the time for closing evidence, it is a case for the exercise of the discretion of the Court, and the affidavit should be received, leave being given to the Defendant to file an affidavit in reply.

Mr. *North*, *contrà*, was not called on.

(1) 1 K. & J. 124, 144. (2) 1 Sm. & Giff. App. xxi. 17 Jur 10
(3) 1 De G. & J. 369. 3 Jur NS 832.

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LORD ROMILLY, M.R.:—

I am of opinion that the application must be refused, as it cannot be granted without altering the practice of the Court.

The only grounds on which new evidence is allowed to be received after ~~replication~~ filed, are these:—First, when a person who desires to file an affidavit has not had an opportunity of seeing the evidence on the other side; secondly, where, though he has seen the evidence, he finds that it raises a new issue not raised by the pleadings, and which is material to the decision of the case; thirdly, where an affidavit has been filed impeaching the character of a witness, in which case the person whose character is assailed is allowed to adduce evidence to meet the charges; and, fourthly, where, after the evidence has closed, new facts have arisen which are material to the issue.

In the present case no sufficient ground has been brought forward, and the motion must be refused with costs.

Solicitor for the Plaintiff: Mr. *H. S. Willett*, agent for Mr. *R. F. Thompson, Kendal.*

Solicitors for the Defendants: Messrs. *Westall & Roberts*, agents for Messrs. *Moser, Arnold, & Moser, Kendal.*

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March 7.

SAYRE v. HUGHES.

Advancement—Mother and Daughter.

11 Eq 11, 2-4
10 Ch 346
-47 6, 8-9

A widowed mother, after making her will in favour of her two daughters, transferred *East India* stock, which had stood in her own name, into the names of herself and the unmarried daughter, and died:—

Held, that there was a presumption of intended benefit to the unmarried daughter which was unrebutted, and that the stock belonged absolutely to her. See Bennet v. B 10 Ch D 474 MR

SUSANNAH BARLING, widow, by her will, dated the 2nd of June, 1862, after desiring that all her debts, funeral and testamentary expenses, should be paid as soon as conveniently might be after her decease, bequeathed unto her daughter, *Sarah Elizabeth Barling* (a Defendant), the interest of £1000, invested in the £5 per Cent. *India* Stock, for her life, and at her decease the said £1000 absolutely to her younger daughter, *Susannah Sayre* (a Plaintiff). The testatrix bequeathed unto *M. A. Featherstone* the sum of £100, and the residue of her property she wished equally divided between her two daughters, *S. E. Barling* and *S. Sayre*, and she appointed the Defendant *Hughes* (who prepared the will) and another person executors. The will was proved by *Hughes* alone. The testatrix at the date of her will had £1850 *India* £5 per Cent. Stock standing in her own name. On the 30th of July, 1862, the testatrix transferred £1000, part of this stock, into the joint names of herself and her daughter, *S. E. Barling*. At the time she made her will she told her daughters, *S. Sayre* and *S. E. Barling*, that she had made it; that she intended to place both their names along with her own at the bank, and that she hoped they would be just. Some little time after the transfer she told *S. Sayre* that she had been advised not to place the stock in her name at the bank on account of her having a husband; that she had placed it in her sister's (*S. E. Barling*) name only with her own, but it would not make any difference to her (*S. Sayre*) when she (the testatrix) was gone. On the 1st of December, 1864, the testatrix transferred £300, further part of the stock, into the names of herself and her daughter, *S. E. Barling*. She always received the dividends and applied the same to her own use. Shortly after the date of the latter transfer the testatrix told *Hughes* that she wished to alter her will, and on the 31st of January, 1865, *S. E. Barling* called upon *Hughes* and asked him to go at once to her mother, as she was dying, and desired to sign the will. *Hughes* accordingly called upon and saw the testatrix, and from her verbal instructions prepared a draft will, which, after providing for payment of debts, bequeathed to *S. E. Barling* her furniture and effects; to *S. Sayre*, £350 *India* stock, and to *M. A. Featherstone*, £100, and all the residue of her property the testatrix bequeathed to her executors to invest in the *India* £5 per Cent. Stock for the sole benefit of *S. E. Barling* during her life, and at her death to be given absolutely to *S. Sayre*, and she directed that, should *M. A. Featherstone* survive *S. Sayre*, the sum of £300 should be paid to her by *S. Sayre*. The testatrix, on the 31st of January, 1865, signed this draft will, but her signature was unattested. When *Hughes* called, on the 1st of February, 1865, for the purpose of having the draft will properly executed, the testatrix was dead.

The testatrix died on the 1st of February, 1865, leaving furniture and effects of the value of about £100, and £550 of the *India* stock, standing in her name.

On the 5th of September, 1865, *S. E. Barling* transferred the sum of £300 *India* stock into the names of herself and *M. A. Featherstone*, and she claimed to be absolutely entitled to the £1300 stock for her own benefit.

The bill was filed by the married daughter and her husband, and prayed a declaration that both sums of stock were at the testatrix's death part of her estate, and that *S. E. Barling* was a trustee thereof for the estate, and consequential relief.

S. E. Barling, by her answer, stated that her father, *Frederick Barling* (who died in August, 1861), at various times purchased *India* stock to the amount, in the whole, of £2100; that at his death the same was standing in his and the testatrix's joint names; and that the latter became, by survivorship, absolutely entitled to it; that on the 24th of September, 1861, the testatrix transferred the whole of the stock into her sole name; that she (*S. E. Barling*) had been subject to fits, and had during the life of her mother invariably resided with, and was maintained by her; that her

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sister had been married for some years; that in 1862, about the time when her mother made the first transfer, she expressed to her mother her apprehension that her sister would, after her death, interfere with her, and thereupon her mother replied:—"You need not be afraid; I have settled all that;" and that she claimed the stock on the ground that it was intended as an advancement to her in the event of her surviving her mother; and she believed that such mode of benefiting her was suggested to, and selected by, her mother by reason of the knowledge she obtained with reference to the effect of a transfer of stock into joint names, from the fact of her father having purchased all the stock in his name and that of her mother's jointly, and that she had by reason thereof become, upon his death, absolutely entitled to the whole of the stock.

Mr. *Bacon*, Q.C., and Mr. *Cecil Russell*, for the Plaintiffs:—

There is no case in which the presumption of advancement has arisen as between a mother and child. The only case which has any bearing upon the point is that of *In re De Visme* (1), where money had been invested by a mother, separated from her husband, in the names of her son, a lunatic, and a daughter, and the Court, on Petition, ordered the stock to be transferred to the daughter, the executrix of the mother's will. The judgment in *Powys* v. *Mansfield* (2) was based entirely upon the duty of a father to advance his child, and nothing was said about its being the duty of a mother to do so. In *Soar* v. *Foster* (3), a purchase of stock in the names of the purchaser (who had incurred an obligation) and his deceased wife's sister, with whom he had gone through the ceremony of marriage, did not raise a presumption of advancement for her. The transfer by Mrs. *Barling* raises no presumption, and there is no evidence to shew that she intended an advancement. There is no duty on the part of a mother to provide for her child, and that is supported by sect. 5 of the 22 & 23 Car. 2, c. 10, and the cases of *Holt* v. *Frederick* (4) and *Edwards* v. *Freeman* (5). It does not lie upon the Plaintiffs to shew that this was not an advancement, but the onus is upon the Defendants to shew that it was. The transactions shew that there was no intention to advance. There is not a tittle of evidence on the part of the Defendants to prove it was an advancement; and the unattested will is a document which declares an intention to the contrary.

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(1) 2 D. J. & S. 17.

(2) 3 My. & Cr. 359.

(3) 4 K. & J. 152.

(4) 2 P. Wms. 356 4 Jur NS 406

(5) 2 P. Wms. pp. 436, 448.

A decree in the terms of the prayer was asked for.

Mr. *Greene*, Q.C., and Mr. *Renshaw*, for the Defendant, *S. E. Barling*:—

Where a parent has dealt with property in this manner, it is *primâ facie* evidence that an advancement was intended. There was a motive on the part of the mother to advance this daughter, for she was subject to fits.

[The Vice-Chancellor referred to *Dyer* v. *Dyer* (1).]

That case is also in *White* and *Tudor's* Leading Cases (2), where it is said (3) that it is "a general rule that where a purchase is made by a parent in the name of a child there will, *primâ facie*, be no resulting trust for the parent; but, on the contrary, a presumption arises that an advancement was intended; and *Finch* v. *Finch* (4) and *Sidmouth* v. *Sidmouth* (5) support that rule. There is nothing in this case to displace the title of *S. E. Barling*, for it cannot be said with accuracy that one parent is not as much bound to provide for offspring as the other. *Currant* v. *Jago* (6) was a case of investment in favour of a wife's nephew, and it shews that nothing will be done by this Court to disturb the legal title. The receipt of the dividends by the mother makes no difference: *Christy* v. *Courtenay* (7). *Beecher* v. *Major* (8) shews that, in this case, any intention on the part of Mrs. *Barling* not to benefit this daughter ought to have been clearly expressed. There is no evidence of any intention, and consequently there is no resulting trust. [*Grey* v. *Grey* (9) was also referred to.]

Both upon principle and authority, as well as upon the facts of this case, it is submitted that there can be no hesitation on the part of the Court in refusing to make the declaration asked.

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(1) 2 Cox, 92.
(2) 2nd Ed. p. 165.
(3) Page 177.
(4) 15 Ves. 43.
(5) 2 Beav. 447.
(6) 1 Coll. 261.
(7) 13 Beav. 96.
(8) 2 Dr. & Sm. 431. 11 Jur NS 538
(9) 2 Sw. 594, App.

Mr. *W. Renshaw* appeared for the Defendant *Hughes.*

Mr. *Bacon,* in reply.

Sir John Stuart, V.C.:—

If stock be found standing in the names of two persons, the presumption of law is that it is their property. But if there be evidence that one of them purchased the stock, and that the name of the other was used without any consideration proceeding from that person, the want of consideration induces the Court to presume a resulting trust. The more simple case, and that generally referred to in the reported decisions, is the case of a purchase by one person in the name of another. As soon as you have the fact of the purchase in evidence, and shew that the purchase-money was paid by a person other than the person to whom the conveyance was made, the fact of want of consideration almost necessarily creates the presumption of a resulting trust. In the case, however, of a father purchasing property in the name of a son, and having the conveyance made to the son—the father paying the purchase-money—the circumstance of relationship raises a presumption of benefit intended for the son which rebuts the notion of a resulting trust. In the case of *Grey* v. *Grey* (1), before Lord *Nottingham,* there was, beyond the simple facts of the purchase and the conveyance, the fact of the receipt of the profits by the father. Where the conveyance is to one person and the purchase-money paid by another, the receipt of the profits by the person who paid the purchase-money in an ordinary case strengthens the presumption that he is the beneficial owner. But in the case of a father and a son this circumstance was not enough to rebut the presumption of benefit to the son. The same doctrine extends to a purchase by a person *in loco parentis.* Lord *Cottenham,* in *Powys* v. *Mansfield* (2), commenting upon the meaning of that expression, said it means a person in such a relation towards the individual in question as raises a presumption of an intention to benefit him.

(1) 2 Sw. 594, App.

(2) 3 My. & Cr. 359.

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10 Ch D 476
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It has been argued that a mother is not a person bound to make an advancement to her child, and that a widowed mother is not a person standing in such a relation to her child as to raise a presumption that in a transaction of this kind a benefit was intended for the child. But the case of a stranger who stands *in loco parentis* seems not so strong as that of a mother. In the case *Re De Visme* (1) it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. The question in that case arose on a petition in lunacy, and it seems to have been taken for granted that no presumption of benefit arises in the case of a mother. But maternal affection, as a motive of bounty, is, perhaps, the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation, and not a legal one. In the case of *Dyer* v. *Dyer* (2) Lord Chief Baron *Eyre* shewed that the relationship between parent and child is only a circumstance of evidence. He said (3), "the clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold—whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successively, results to the man who advances the purchase-money." This, he says, is in "strict analogy to the rule of the common law, that where a feoffment is made without consideration the use results to the feoffor. But it is the established doctrine of a Court of Equity that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees being a child or children of the purchaser is to operate by rebutting the resulting trust." The word "father" does not occur in Lord Chief Baron *Eyre's* judgment, and it is not easy to understand why a mother should be presumed to be less disposed to benefit her child in a transaction of this kind than a father.

The case of *Grey* v. *Grey* (4), before Lord *Nottingham*, was one of freehold property, and the case of *Dyer* v. *Dyer* was one of

(1) 2 D. J. & S. 17.
(2) 2 Cox, 92.
(3) 2 Cox, 93.
(4) 2 Sw. 594, App.

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copyholds. In both cases fathers were the purchasers. In *Grey* v. *Grey* (1) the father received the profits after the purchase, and that was an important circumstance—the immediate benefit being for the father himself. But Lord *Nottingham* says (2), "The difference I rely upon is this: Where the son is not at all, or but in part advanced, and where he is fully advanced in his father's lifetime. If the son be not at all, or but in part advanced, there if he suffer the father who purchased in his name to receive the profits, this act of reverence and good manners will not contradict the nature of things and turn a presumptive advancement into a trust; the rather because in this family there were neither debts nor casualties, so no occasion to create trusts; but if the son be married in his father's lifetime, and by his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated, there a subsequent purchase by the father in the name of such a son, with perception of profits by the father, will be evidence of a trust; for all presumption of an advancement ceases."

In this case there was no purchase at all, for the widowed mother had, by surviving her husband, become entitled to the *East India* stock which had been standing in their joint names. She enjoyed this stock after her husband's death, and she knew that from its having been placed in their joint names she had become the absolute owner of it. She transferred £1000 of this stock into the joint names of herself and a daughter; and the question is, for what purpose? Did she intend the daughter to be a trustee for her? There seems to be no rational motive for that, because the security was not made better; on the contrary, it put the stock out of her own sole control. If the purpose was one of trust, which is a purpose of security, certainly it was not accomplished, and therefore I cannot presume that no benefit to her daughter was intended. Being a transfer of stock, it was not like paying money down and taking a conveyance in the name of the daughter. The difference is not very great, yet it is something. The mother being absolute owner of this stock, transferred it into the joint names of herself and this daughter, and she knew from her own experience that by survivorship it would belong to the

(1) 2 Sw. App. 594.

(2) 2 Sw. 600.

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daughter. If the daughter survived, she would obtain the benefit of the stock without payment of legacy duty. The relationship of parent and child, and the other circumstances, satisfy me that the name of the daughter was not used as a trustee. My opinion is, that the purpose was one of benefit for this daughter; that there was no resulting trust; and that this daughter is absolutely entitled to the stock.

The transfer of the sum of £300 was, I think, also made for the purpose of benefiting this daughter. Order that part of the bill which seeks a declaration as to the stock to be dismissed, and declare that the stock now standing in the name of *Sarah Elizabeth Barling* is her own absolute property. Order that the usual accounts be taken, and that there be no costs on either side.

Solicitor for the Plaintiffs: Mr. *Alfred Howard.*
Solicitor for the Defendants: Mr. *W. Carpenter.*

AVERN *v.* LLOYD.

V.-C.S.
1868
Feb. 19, 20;
April 17.

L R 7 Eq 363
— 365, -8
10 Ch D 578

Will—Bequest of Personal Estate to unborn Issue—Absolute Interest in Survivor—Remoteness.

Bequest of personal estate to unborn issue as tenants for life, and to the executors, administrators, and assigns of the survivor of the unborn issue, gives an absolute interest to the survivor, and is not too remote.

THIS cause came on to be heard on further consideration and on a Petition.

Joseph Wright, by will, in March, 1780, after directing his executors, as soon after his decease as might be convenient, to sell all his effects, and to invest the proceeds in some of the public funds, directed them to pay one moiety of the dividends to arise from such funds to his brother *Francis* for life, and after his decease to the issue male of his brother *Francis* equally, share and share alike, for their lives and the life of the longer liver, and after the decease of the survivor, or in case there should be no such male issue of his brother *Francis*, to pay such moiety of the dividends to his brother *John Wright* for life, and after his decease to his issue male equally, share and share alike, for their respective lives and the life of the longer liver; and after the decease of the survivor, or in case there should be no such issue male of his brother *John*, then to all and every the daughters and daughter of his brother *Francis* equally, share and share alike, for their respective lives, and to the survivors and survivor; and after the decease of the survivor of such daughters and daughter of his brother *Francis*, he bequeathed the moiety of the funds and the dividends thereof to the executors, administrators, and assigns of the survivor of his brothers *John* and *Francis*, or their issue, male or female, who should happen to be such survivor. The testator directed his executors to pay the other moiety of such funds to his brother *John* for life, and after his decease to pay the dividends of such moiety to his issue male for their lives and the life of the longer liver; and after the decease of the survivor, or in case there should be no such issue male of his brother *John*, to his brother *Francis* for life, and after his decease to his issue male equally, for their lives and the life of the longest liver; and after the decease of the survivor, or in case there should be no such issue male of his brother *Francis*, then to all and every the daughters and daughter of his brother *Francis* equally, for their lives and the lives of the survivors and survivor, and after the decease of the survivors and survivor of such daughters and daughter of his brother *Francis*, he bequeathed the last-mentioned moiety of such funds and the dividends to the executors, administrators, and assigns of the survivor of his brothers *John* and *Francis*, or their issue, male or female, who should happen to be such survivor.

The testator died in 1785.

Francis Wright died in 1801, leaving three sons, *Joseph*, *John*, and *Francis*, and five daughters, of whom *Ann* intermarried with the Defendant *Robert Lloyd*.

In March, 1815, in a suit instituted by the three sons against their uncle *John* and others, for the purpose of having their rights under the will declared, Sir *W. Grant* ordered the transfer into Court by the uncle *John* of £1100 £3 per Cent. Stock, and of £950 New South Sea Annuities, in trust in the cause "the account of the legatees for life;" that the costs should be taxed and paid out of a sale of sufficient of such stock; that one moiety of the dividends accruing on the residue of such stock until such sale, and on the residue after such sale, and one moiety of the dividends accruing on the annuities, should be paid to the three Plaintiffs in equal shares during their joint lives, and after the death of them, or either of them, that the whole of the dividends of the last-mentioned money should be paid to the survivor during his life; and that the dividends accruing on the other moiety of the annuities should be paid to the uncle, *John Wright*, during his life, and that on his death and that of the survivor of the three Plaintiffs, any persons entitled to the moieties of the stock and annuities were to be at liberty to apply to the Court.

The funds were transferred into Court, and by the payment of costs the stock was reduced to £764 13*s.* 8*d.*

The uncle, *John Wright*, died in 1818 without issue. In January, 1819, it was ordered in the cause that the whole of the dividends on the stock and annuities should be paid to the Plaintiffs, *Joseph*, *John*, and *Francis Wright* equally. *Joseph Wright* died in 1820, and, on Petition, it was ordered that the dividends should be paid to *John* and *Francis* in moieties. *John* and *Francis* sold their interests in the stock and annuities, and it was ordered that the dividends should be paid to their assignee during their lives and the life of the survivor. *John Wright* died in 1849. *Ann Lloyd* was the survivor of the five daughters of *Francis*, the brother of the testator. She died in 1842, and the Defendant, her husband, became her legal personal representative.

Francis Wright, the survivor of the three Plaintiffs above mentioned, died in April, 1856, and since that date no dividends had been paid to any person. Letters of administration to the effects of the said *Francis* were granted to his daughter, the Plaintiff, *Emma M. Avern*, and she and her husband, in April, 1863, filed their bill praying for a declaration that she, as administratrix, was entitled to the funds in Court, or, if not, that the rights of all parties under the will might be declared.

Mr. *Smart* (Mr. *Bacon*, Q.C., with him), for the Plaintiffs, contended that the gift of the *corpus* to the executors, administrators, and assigns of the survivor, was, in fact, a gift to the survivor, the

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words "executors, administrators, and assigns," being merely words of limitation: *Jarman* on Wills (1); *Grafftey* v. *Humpage* (2); that a gift to the survivor of the testator's brothers named in his will, and their children, was not too remote, although limited to take effect after life estates given to the same persons, inasmuch as the gift must vest in a person coming into being within the period of a life in being, and must be capable of alienation by such person within the period of a life in being, and twenty-one years afterwards.

That a limitation which, from the nature of the subject of gift, as in the case of a life estate, or from the nature of a qualification added to the gift, as in a gift to children living at the death of the testator, could never extend beyond the period allowed by law, was good, though limited to arise upon an event which, abstractedly considered, might happen after that period. Thus, though a gift to *A.* after an indefinite failure of issue of *B.* was void, yet a gift to *A.*, if living, after an indefinite failure of issue of *B.*, was good: *Fearne's* Contingent Remainders (3); *Oakes* v. *Chalfont* (4); *Campbell* v. *Harding* (5); *Jee* v. *Audley* (6); and, as a gift for life to unborn persons might be good, so might a gift over after such a life estate, provided it was to take effect in favour of persons who were competent objects of the gift: *Routledge* v. *Dorril* (7).

That the object of the rule against perpetuities was to prevent property being rendered inalienable beyond a life or lives in being, and twenty-one years afterwards: *Lewis* on Perpetuities (8).

That in the present case all the parties in whose favour the ultimate gift could take effect were competent objects, and the property must be alienable within the period allowed by law, without any necessity for the consent of any third parties; and that therefore the gift was good.

Mr. *Dickinson*, Q.C., and Mr. *Millar*, for the Defendant, cited the case of *Palmer* v. *Holford* (9), and then contended that the rule as laid down in *Leake* v. *Robinson* (10) must govern this case. It could not be said at the death of the testator that the person to take with certainty a vested interest in this property during the lives in being and twenty-one years afterwards was discovered. There were two classes to whom the word "survivor" applied, viz., the survivor of *John* and *Francis*, or their issue, male or female, and, beyond all controversy, a gift in such a manner was too remote. The reason of the rule in *Leake* v. *Robinson* (1) was clear; it was to prevent property being tied up beyond a certain time, and in this case the gift was in suspense until all but one person of these classes were dead. The suspension might, probably would, and in fact did, go beyond the twenty-one years before the person to take could be ascertained. If the principle in *Leake* v. *Robinson* was to be upheld, there could be only one answer. The decision in the case of *Routledge* v. *Dorril* (2) was, they submitted, in their favour.

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(1) 2nd Ed. vol. ii. pp. 90, 91.
(2) 1 Beav. 46.
(3) Vol. i. p. 488.
(4) Pollexf. 38.
(5) 2 Russ. & My. 390; S. C. 2 Cl. & F. 421.
(6) 1 Cox, 324.
(7) 2 Ves. 357.
(8) Page 164.
(9) 4 Russ. 403.
10) 2 Mer. 363.

Mr. *Crossley* appeared for Mr. and Mrs. *Winter*, who had obtained liberty to attend the proceedings in Chambers.

Mr. *Smart*, in reply, referred to *Lewis* on Perpetuities (3), and contended that there was nothing in the case of *Leake* v. *Robinson* to shew that there must be an absolutely vested interest. This property was clearly vested in a class of persons, but not in a particular member of the class. If, however, the persons amongst whom the transmissible interest was to go were, as in this case, known, then this gift was good, and was not within the mischief which the rule against perpetuities was intended to obviate.

Mr. *Dickinson* mentioned the case of *Ker* v. *Lord Dungannon* (4); *S.C. Lord Dungannon* v. *Smith* (5); and commented upon by Lord *St. Leonards* on Real Property (6).

Mr. *Smart* also referred to the last-mentioned case, as stated in *Tudor's* Leading Cases in Conveyancing (7).

Apr. 17. SIR JOHN STUART, V.C.:—

In this case there is no question as to the validity of the limitation of the life estates in remainder to the unborn issue, male and

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(1) 2 Mer. 363.
(2) 2 Ves. 357.
(3) 1st Ed. p. 164.
(4) 1 D. & War. 510.
(5) 12 Cl. & F. 546.
(6) Pages 342, 343.
(7) Page 417, 2nd Ed.

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female, of the testator's brothers, *John* and *Francis.* The unborn issue clearly take life estates, share and share alike. But it has been contended that the ultimate limitation to the executors, administrators, and assigns of the survivor of these tenants for life is too remote. The limitation is in these terms: "To the executors, administrators, and assigns of the survivor of his brothers *John* and *Francis,* or their issue, male or female, who shall happen to be such survivor." Considering that this limitation to the executors, administrators, and assigns must take effect in the lifetime of one of the unborn issue to whom a good estate for life is given, so as to give him an absolute estate in possession when he becomes survivor, it is not easy to see on what ground it can be considered as too remote. The gift to the executors, administrators, and assigns of the surviving tenant for life attaches to the life estate, so as to give a contingent absolute interest to each tenant for life. This contingent absolute interest vests in possession in the surviving tenant for life as soon as he is ascertained. It attaches the absolute interest as much to the life estate in the case of personal property as the rule in *Shelley's Case* (1) attaches the inheritance to the life estate in the case of a contingent limitation to the heirs or the heirs of the body of the tenant for life of a freehold estate, so as to make the heir take by descent when the contingency happens. Each of the tenants for life in this case had as much right to alien his contingent right to the absolute interest as to alien his life estate; and the person claiming under an assignment of the whole estate and interest of the tenant for life would, as soon as his assignor became the survivor of the other tenants for life, be entitled to the possession and enjoyment as absolute owner. It seems obvious that such a case is not within the principle on which the law against perpetuity rests, and that the limitation in question of the absolute interest does not fail as being too remote.

Solicitors for the Plaintiffs: Messrs. *Ewbank & Partington.*
Solicitors for the Defendant: Messrs. *Pritchard & Englefield.*
Solicitors for other Parties: Messrs. *Lambert & Burgin.*

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(1) 1 Rep. 219.

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2 P. Wm 47
3 Ch. D. 158

Will—Construction—Interests to become "vested" at Twenty-five—"Vested" read "Indefeasible"—Remoteness.

Testatrix bequeathed her residue, consisting wholly of personalty, upon trust, as to one-fifth share thereof, to pay the income to her great nephew *H.* for life, and at his decease to pay the share unto and among all and every the children and child of *H.*, if more than one, equally; as to the other four-fifths, upon like trusts for the benefit of testatrix's great nieces and nephews, *R.*, *P.*, *T.*, and *A.*, and their children respectively. In the event of the death of any one or more of them, the said *H.*, *R.*, *P.*, *T.*, and *A.*, without leaving issue, she directed that the share or shares of him, her, or them so dying should be in trust for the survivor or survivors of them, and the income and capital be paid and divided in the same manner as was directed as to the original shares. She then directed that none of the said shares should be "so paid to or become vested interests in" any of the said children of the said *H.*, *R.*, *P.*, *T.*, and *A.*, until he, she, and they attained the age of twenty-five respectively; and that in the meantime it should be lawful for the trustees to pay any part of the income from "such shares respectively towards the maintenance and education of such children respectively." The will then contained a proviso (which was admitted to be void for remoteness) that if any of the said children of the said *H.*, *R.*, *P.*, *T.*, and *A.* should die before attaining twenty-five, the shares or share of him, her, or them so dying should accrue to the survivors and survivor. Testatrix then declared that, in case of the death of any other of the said children "before such accruing or surviving shares shall become vested as aforesaid," every such accruing or surviving share should again be subject to the same condition of accruer: provided nevertheless that, in case any of such child or children should have left issue, such issue should take such share in the trust funds as his, her, or their deceased parent or parents would have had "if living;" and such share or shares "to be paid to" such issue at such age or time as thereinbefore was directed with respect to the payment of their parents' original shares:—

Held, that the word "vested" must be construed as meaning "indefeasible;" and that the remainders to the children of *H.*, *R.*, *P.*, *T.*, and *A.*, vested in such of the said children as were alive at the death of the testatrix, or were born afterwards.

PETITION.

Rachel Edmondson, late of *Leyburn*, in the county of *York*, spinster, by her will, dated the 22nd of September, 1828, after giving certain pecuniary legacies, gave and bequeathed all the residue of her estate and effects (which consisted wholly of personalty), to trustees, upon the following trusts:—

"As to one full fifth part or share thereof, to pay the yearly interest, dividends, or other annual produce therefrom arising, when and as the same shall be received, unto my great nephew, *Henry Pariss* (son of *Peter Pariss*), for and during the term of his natural life, and up to the day of his death; and at his decease, then upon trust to pay such one full fifth part or share unto and among all and every the children of the said *Henry Pariss*, if more than one, equally, share and share alike, and if there be but one, then to such child only. And upon trust as to one other full fifth part or share of such trust funds and premises to pay the yearly interest, dividends, and annual produce therefrom arising, unto my great niece, *Rachel Pariss*, the daughter of the said *Peter Pariss*, for the term of her natural life, and up to the day of her death, independent of any husband she may happen to marry, and entirely free from his control, debts, or intermeddling; and at her decease then upon trust to pay the said full fifth part or share unto and among all and every her children, if more than one, equally, share and share alike, and if there be but one such child, then to that one only. And upon trust as to one other full fifth part or share of such trust funds and premises, to pay the yearly interest, dividends, and annual produce arising therefrom, unto my great nephew, *Peter Pariss* the younger, son of the said *Peter Pariss*, for the term of his natural life, and up to the day of his death; and at his death, then upon trust to pay the same full fifth part or share unto and among all and every his children, if more than one, equally, share and share alike, and if there be but one, then to such one child absolutely. And as to one other full fifth part or share of the said trust funds and premises, upon trust to pay the yearly interest, dividends, and annual produce arising therefrom, unto my great nephew, *Thomas Pariss*, another son of the said *Peter Pariss* the elder, during the term of his natural life, and up to the day of his death; and at his decease, upon trust to pay the said full fifth part or share unto and amongst all and every the children of the said *Thomas Pariss*, if more than one, equally, share and share alike, and if there should be only one such child, then to such child absolutely. And as to the remaining full fifth part or share of the same trust funds and premises, upon trust to pay the yearly interest, dividends, and annual produce arising therefrom, unto my great niece, *Ann Pariss*, another daughter of the said *Peter Pariss*, during her life, and up to the day of her death, independent of and free from the debts, control, or intermeddling of any husband she may marry; and at her death then upon trust to pay the same full fifth part or share unto and equally between and among her children, if more than one, share and share alike, and if there be but one such child, then to such child only."

"And in the event of the death of any one or more of them, the said *Henry Pariss*, *Rachel Pariss*, *Peter Pariss* the younger, *Thomas Pariss*, and *Ann Pariss*, without leaving lawful issue him, her, or them surviving, then it is my will and mind that the share or shares of him, her, or them so dying shall be in trust for the survivor or survivors of them, and the yearly interest, dividends, or other produce arising from such accruing or surviving share or shares shall be divided among the survivors or survivor, and be paid in the same manner as the interest, dividends, and annual produce arising from their original part or share, parts or shares, is hereinbefore directed to be paid, and the principal of such surviving or accruing shares or share shall be equally divided among all and every the children of such survivors or survivor in the same manner and form as is herein directed as to their original part or share, parts or shares, respectively."

"And I do hereby further declare and direct that none of the said shares of the said principal sums or fifth parts or shares shall be so paid to or become vested interests in any of the said children of the said *Henry Pariss*, *Rachel Pariss*, *Peter Pariss* the younger, *Thomas Pariss*, and *Ann Pariss*, until he, she, and they attain the age of twenty-five years respectively; and that in the meantime, and until such shares shall vest respectively, it shall be lawful for the trustees of this my will for the time being to pay and apply all or any part of the interest, dividends, or yearly produce arising from such shares respectively, in or towards the maintenance and education or otherwise of such children respectively."

"Provided, and I do hereby further declare my will to be, that if any of the said children of the said *Henry Pariss*, *Rachel Pariss*,

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Peter Pariss the younger, *Thomas Pariss*, and *Ann Pariss* respectively shall happen to die before he, she, or they shall attain his or their age or respective ages of twenty-five years, then the shares or share of him, her, or them so dying shall go and accrue to the survivors or survivor or other or others of such children (brothers and sister) of the child or children so dying, and be equally divided amongst them, if more than one, share and share alike, and the same shall become vested and payable or transferable at such ages, days, and times as his, her, and their original share and shares are hereby directed to become vested and payable or transferable as aforesaid."

"And in case of the death of any other of the said children before such accruing or surviving shares or share shall become vested as aforesaid, then every such accruing or surviving part or share shall again be subject and liable to such right, chance, contingency, or condition of accruer to and amongst the survivors or survivor and other or others of the said children as hereinbefore is provided as to the said original share or shares."

"Provided nevertheless, and I hereby expressly declare, that in case any of such child or children shall have left issue of his, her, or their body or bodies lawfully begotten, then my will is, that such issue shall have and be entitled to such share or shares of and in the said trust funds and premises as his, her, or their deceased parent or parents would have had and been entitled to under this my will, if living, and such share or shares to be paid to such issue at such age or time as hereinbefore is directed with respect to the payment of their parents' original shares."

The testatrix died on the 20th of June, 1831. Her next of kin were her sister, *Elizabeth Edmondson*, and her niece, *Ann Pariss* the elder, wife of *Peter Pariss* the elder.

Thomas Pariss died in August, 1833, having never been married.

Elizabeth Edmondson died on the 12th of June, 1841, having by will, dated the 15th of September, 1836, devised to the said *Rachel, Ann, Henry*, and *Peter Pariss* the younger, all her residuary personal estate in equal shares.

The residuary estate of the testatrix, *Rachel Edmondson*, was realised and invested in the sum of £2730 4*s.* 9*d.* stock.

In 1843 *Rachel Pariss* married *Nicholas Trant*, and by an antenuptial settlement dated the 28th of March, 1843, after reciting that, by reason of the remoteness of the provision in the testatrix's will expressed to be made in favour of the children of *Henry*, *Rachel*, *Peter*, *Thomas*, and *Ann Pariss*, the same were void and of no effect, and that the residuary estate of the testatrix, save only as to the life estates, remained undisposed of, *Rachel Pariss* assigned to trustees all her estate and interest expectant on the determination of the several life interests given by the testatrix's will, upon the trusts therein declared; and by the same indenture *Peter Pariss* the elder, as to all the estate and interest which he then had, or thereafter might have, in the residuary estate of the testatrix as the husband of *Ann Pariss* the elder, covenanted that all and singular the principal fund and trust moneys, the annual produce whereof was, or thereafter might become, payable to the said *Rachel Pariss* during her life by virtue of the will of the testatrix, should, without prejudice to the life interests, be transferred and assured to the said trustees, upon the same trusts.

In July, 1847, *Ann Pariss* the younger married *Edward Planta Nesbitt.*

Peter Pariss the younger died in December, 1851, intestate, leaving a widow and three children.

Ann Pariss the elder died in the lifetime of her husband, *Peter Pariss* the elder, who died on the 15th of June, 1853, having, by will dated the 9th of March, 1852, bequeathed his residuary personal estate to his son and executor, *Henry Pariss.*

Nicholas Trant died in 1853, leaving his widow and several children surviving.

In 1854 *Ann Nesbitt* died, leaving her husband and two children surviving.

Henry Pariss died on the 11th of January, 1864, intestate, leaving his widow and administratrix, *Jane Pariss*, and eight children surviving.

The petition was presented by *Jane Pariss* and her eight children, insisting that the several gifts of a fifth share of the testatrix's residue made by her will to the children of her great nephews and nieces respectively were void for remoteness, and that they were undisposed of.

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According to this view, the petitioner, *Jane Pariss*, would be entitled as administratrix of *Henry Pariss*, one of the four devisees of *Elizabeth Edmondson*, one of the two next of kin of the testatrix, to one eighth of the fund; and as administratrix of *Henry Pariss*, the executor and residuary devisee of *Peter Pariss* the elder, the surviving husband of *Ann Pariss* the elder, the other of the testatrix's next of kin, to three eighths; making together one moiety of the fund. As a consequence of the same contention, they submitted that Mrs. *Trant's* trustees were entitled to one eighth under the will of *Elizabeth Edmondson*, and one eighth under the settlement, making together one fourth of the fund; the widow and children of *Peter Pariss* the younger to one eighth; and *Edward P. Nesbitt*, in right of his widow, to the remaining eighth.

The fund had been paid into Court, and was now represented by a sum of £2682 3*s*. Reduced Annuities.

Mr. *Joshua Williams*, Q.C., and Mr. *Bovill*, for the Petitioners:—

The tendency of recent decisions has been to give to expressions used by testators their natural signification. Here the testatrix has declared that none of the original shares shall "be paid to or become vested in" the children of the five persons named until twenty-five, and she has provided for maintenance and education "in the meantime and until such shares shall vest."

It is clear beyond dispute that the gift over, in the event of any of the children of the five persons named dying under twenty-five, is void for remoteness.

We cite in our favour *Leake* v. *Robinson* (1); *Russel* v. *Buchanan* (2); *Comport* v. *Austen* (3); *Vawdry* v. *Geddes* (4); *In re Thatcher's Trusts* (5).

The cases on the other side, which we say are distinguishable, are *Bland* v. *Williams* (6); *Taylor* v. *Frobisher* (7); *Re Baxter's Trusts* (8); *Berkeley* v. *Swinburne* (9); *Re Bulley's Estate* (10).

(1) 2 Mer. 363, 387.
(2) 7 Sim. 628.
(3) 12 Sim. 218, 246.
(4) 1 Russ. & My. 203.
(5) 26 Beav. 365.
(6) 3 My. & K. 411.
(7) 5 De G. & Sm. 191, 199.
(8) 10 Jur. (N.S.) 845.
(9) 16 Sim. 275.
(10) 11 Jur. (N.S.) 847.

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Mr. *Westlake*, for the trustees of Mrs. *Trant's* settlement, supported the same view:—

The clause of survivorship, which seems at first sight to be unnecessary, if the intention were that the shares should vest at twenty-five, will appear not to be purposeless, if it be regarded as introductory to the last clause, containing the substituted gift to issue.

Mr. *Druce*, Q.C., and Mr. *Blackmore*, for the widow and children of *Peter Pariss* the younger and the children of *Edward P. Nesbitt*:—

This is one of those cases in which the Court must hold, upon the intention of the testatrix as shewn by the whole will, that by the word "shares" she meant shares already vested; and when she directed that none of the shares should be "vested in" the children until twenty-five, she meant that none should be "paid to" them until twenty-five. In this view the original gifts to the children are not void for remoteness.

It is not disputed that the gifts over in the event of any of the children dying under twenty-five are void.

In *Russel* v. *Buchanan* (1) the same argument was used as was open to contention in *Taylor* v. *Frobisher* (2), where, nevertheless, it was held that "vested" simply meant "indefeasible," or not "liable to be divested." It is always a question whether "vested" is to have its technical sense, or to be construed as meaning "indefeasible."

In *Comport* v. *Austen* (3) the words "vested interests" preceded the words relating to payment.

So in *Vawdry* v. *Geddes* (4) the postponement to the age of twenty-two was part of the original gift; there was no gift but in the direction to pay at that particular period.

Here the testatrix has put her own construction on the will. She has said that the shares are not to be paid to or become vested interests in the children until twenty-five, meaning that they are not to be indefeasible until that period.

The clauses as to maintenance certainly help the Court to construe the will as directing an immediate vesting.

(1) 7 Sim. 628.
(2) 5 De G. & Sm. 191.
(3) 12 Sim. 218. 246.
(4) 1 Russ. & My. 203.

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In the subsequent clause the word "vesting" was not repeated, because she considered she had expressed her meaning sufficiently when she spoke of "payment."

Mr. *Williams*, in reply.

Mar. 3. Sir W. Page Wood, V.C.:—

In this case the question arises upon the construction of the will of *Rachel Edmondson*, which, though prepared in a very formal manner, appears to have been framed by a person who was not exactly cognisant of the rules of law with reference to interests in remainder.

The question is, how the word "vested" is to be construed. Now, I entirely agree with all that has been said by other Judges on this subject—that the word "vested" has a legal meaning, and that it is to be interpreted primarily as meaning "free from all contingency." But the word at the same time is a flexible word. It has been construed to mean indefeasibly vested, as contrasted with being vested subject to some defeasance of interest.

The question is whether it is necessary so to construe it here.

Now, in the first part of this will, there is nothing whatever to shew that the gifts to the children of the persons named are not to vest immediately on the death of their parents. One limitation will suffice, as they are all given in very nearly the same terms. The testatrix directs a division of her property into fifths, according to the number of her great nephews and nieces; and as to one fifth she directs the income to be paid to her great nephew, *Henry Pariss*, for life; and at his decease she gives the same upon trust to pay such one-fifth part or share "unto and among all and every the children of the said *Henry Pariss*, if more than one, equally, share and share alike; and if there be but one, then to such child only." That is, she makes a clear gift in remainder to all the children of *Henry* who may be living at his death, or born in due time afterwards.

Then, having gone through all her great nephews and nieces in this way, she says, "And in the event of the death of any one

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or more of them, the said *Henry Pariss*, &c., without leaving lawful issue" [His Honour read the clause, and continued]:—

Up to this time she has directed nothing other than an immediate vesting in the manner described. She does not say, "without leaving lawful issue who shall attain twenty-five;" but if either of them die "without leaving lawful issue, him or her or them surviving," the share is to go over. She then declares that none of the said fifth parts or shares shall be "so paid to or become vested interests in" any of the children until they attain twenty-five. So that, if the shares are not to be vested till twenty-five, it might easily happen that one of the great nephews or nieces might have children who might die under twenty-five, leaving issue; and in that case there would be an intestacy; because, afterwards, there is a careful confinement of accruer to the brothers and sisters of the children so dying. So that a state of things might occur in which, although there might be issue, the gift would fail, and there would be an intestacy. If *Thomas* had had a child who had died under twenty-five, leaving issue, his share would have fallen into the residue, and have passed to the next of kin, of whom *Thomas* was not one. That is not a very probable solution of the testatrix's intention.

Then comes the consideration which has been so often pressed in *Festing* v. *Allen* (1) and other cases, that if the shares are contingent till twenty-five, the accruer clause is wholly useless and unnecessary, unless, as was ingeniously suggested by Mr. *Westlake*, the clause was intended to be a mere machinery for giving effect to the subsequent limitation to the issue of children. If this construction be adopted, the result will be found to bear strongly in favour of the intention that the shares should be vested; for in the last proviso the testatrix declares that, in case any such child shall have left issue of his, her, or their body or bodies, such issue is to take the share which his, her, or their deceased parent or parents would have had under the will, "if living" (not "if living and attaining twenty-five years," but "if living"). So that, if it be held that these shares vested at twenty-five, the result would be that any issue of a child of a great nephew or niece of the testatrix would at least have to wait till his or her parent attained

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(1) 5 Hare, 575.

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twenty-five before he or she could take anything under this gift.

It does appear to me that, if these two things are put together, there is the very strongest intention that these children are to have their shares vested at once. The whole will then becomes intelligible; and when the testatrix says at the end that such shares are "to be paid" to such issue at such age or time as hereinbefore directed with respect to "the payment" of their parents' original shares, she further shews that the payment, and not the vesting, was intended to take place on their attaining twenty-five. Here she refers back to the passage in which she has declared that none of the said shares shall be so "paid to or become vested interests in" any of the children until twenty-five.

But the point upon which I most rely is this: If I see that an intestacy must take place if any of the children of the first takers should die before attaining twenty-five, although leaving issue, and then there is a subsequent reference to the shares of such parents "if living," not "if living and attaining twenty-five," I think the construction must be in favour of the shares vesting immediately.

This, therefore, is one of those cases in which the words "vested interests" must be held to mean "indefeasible interests."

Of course, the gift over on the death of children under twenty-five is void for remoteness.

The case of *Comport* v. *Austen* (1) is that which comes nearest to the present; but in that case there were very considerable differences. There the same question of intestacy arose, but there the gift over was subsequent to the first clear provision, which was, that the shares were to become vested at twenty-five.

In the present case there is a very plain and marked desire that there should be an immediate vesting.

As to the word "issue" in this will, it must be held to mean children, if this ruling should be necessary.

The declaration will be that, according to the true construction of the will of the testatrix, her residuary personal estate was given in equal fifth parts to the five great nephews and nieces respectively named in her will, for life, with remainders to their children,

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(1) 12 Sim. 218.

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which vested respectively in such of their children as were alive at the death of the testatrix, or were born afterwards; with a gift over of the one-fifth share of any great nephew or niece of the testatrix who might die without leaving issue him or her surviving. And a declaration that upon the death of *Thomas* without leaving such issue, his share became divisible into four equal parts, which were well given by the will to the surviving great nephews and nieces of the testatrix for their lives respectively, with remainders to their children as before mentioned. Then I must declare that the limitation which was attempted to be made by the will, of the shares of children of the great nephews and nieces of the testatrix who should die without having attained the age of twenty-five, is void for remoteness; and inquiries must be directed as to who the children were of each of these four persons, and when they died.

Solicitors for the Petitioners: Messrs. *Lucas & Showler.*
Solicitor for the Respondents: Mr. *J. Pedley.*

PRICE *v.* HALL.

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Jan. 17, 22.

9 Eq. 391,
2 Ch D. 419.

Will—Construction—Contingent Remainder.

Devise to *A.* (testator's widow) for her life, chargeable with the payment of £15 yearly and every year during his life unto testator's grandson *B.* (who was his heir-at-law) and to his children equally after his death; "and as to my said real estates, after the death of *A.* I devise the same equally to the child or children of *B.*, if he leave any him surviving; but in case he leave no child or children him surviving, I devise my said real estates unto the child or children of my cousin *C.*"

At the death of *A.*, *B.* had three children living, and two had since been born to him:—

Held, that the gift to *B.*'s children was contingent during his lifetime, and failed by the dropping of *A.*'s life estate in his lifetime, and that consequently *B.* was entitled as heir-at-law.

GEORGE HALL, by his will, dated the 28th of February, 1839, bequeathed his personal estate to his wife absolutely for her own use, benefit, and disposal, and all his real estate, for and during the term of her natural life, chargeable with the payment of debts and expenses, and £15 yearly and every year during his natural life unto his grandson *William Hall*, and to his children equally after his death. "And as to my said real estates, after the death of my wife I give, devise, and bequeath the same equally to the child or children of my said grandson *William Hall*, if he leave any him surviving, but in case he leave no child or children him surviving, I give, devise, and bequeath my said real estates, or the residue thereof, unto the children or child of my cousin, *Jonas Wilman*, of *Althorpe*, the said *Jonas Wilman* and his wife first taking the income thereof yearly and every year during his life."

The testator died in March, 1843. *Mary Hall*, his widow, died in June, 1855, leaving *William Hall* her surviving.

At the date of testator's death *William Hall* had no children living, but five children had since been born to him, of whom three were living at the death of the testator's widow, *Mary Hall*, the tenant for life, the other two having been born since her death.

The bill was filed by the children of *William Hall* for the purpose of ascertaining the rights of all parties, and it was prayed that the income of the infants' shares might be applied for their maintenance and education, and the back rents accounted for by *William Hall*, who was in possession.

At the hearing the Vice-Chancellor allowed the two children of *William Hall* born after the death of *Mary Hall* to be added to the record as Defendants.

Mr. *Freeman*, for the Plaintiffs, the three children of *William Hall* living at the death of the tenant for life:—

The interest of the Plaintiffs vested at the death of *Mary Hall*, although it was liable to be divested in the event of *William Hall* dying without leaving any children; the case being governed by the rule that a devise to a person at a given age, followed by a limitation over in case he die under that age, is not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over. In this class of cases the Court has given effect to the supposed intention of the testator, that the first devisee shall take all that the testator has to give except what he has given to the devisee over: *Bromfield* v. *Crowder* (1);

(1) 1 B. & P. (N.R.) 313, 324.

Edwards v. *Hammond* (1), which case is stated in *Holmes* v. *Prescott* (2) to this effect: A larger rule was then introduced, viz., that when there was a gift to *A.* at twenty-one, or if he attained twenty-one, or the like, importing contingency, if there was a gift over exactly corresponding with the amount of estate so limited to *A.*, the first devisee took all that was not given to the second devisee, an intestacy in the meantime not being intended.

It may be said that by giving vested interests (liable to be divested) to those children who were living at the death of the tenant for life, after-born children will be excluded contrary to the testator's intention. But his intention is to benefit the children of *William Hall*, and by construing the gift as contingent, that intention will be entirely defeated. [He also cited *Doe* v. *Moore* (3); *Doe* v. *Nowell* (4); *Phipps* v. *Ackers* (5); *Goodtitle* v. *Whitby* (6); *Doe* d. *Cadogan* v. *Ewart* (7).]

Mr. *Faber*, for the children of *Jonas Wilman*, and the two after-born children of *William Hall*, contended that the gift over took effect as an executory devise: and so far as the after-born children of *William Hall* were concerned, that the class was liable to be enlarged by the birth of children to *William Hall* after *Mary Hall's* death, the death of *William Hall*, and not that of the tenant for life, being the period for determining the class entitled to take.

Mr. *Winterbotham*, for *William Hall* and his mortgagee:—

The gift is by way of contingent remainder to those children of *William Hall* who fulfil the condition of being alive at the death of *William Hall*; or in the event of *William Hall* leaving no children, then over to the children of *Jonas Wilman*: the case falling within that class of cases where the description of the devisees is such that there is no gift to any one who does not answer the entire description, and fulfil the condition which is precedent to his being entitled to take. At the death of *Mary Hall*, the tenant for life, the period for ascertaining the class had not arrived, as *William Hall* was still living, and, consequently, the contingent

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(1) 3 Lev. 132; 1 B. & P. (N.R.), n. 324.
(2) 33 L. J. (Ch.) 264. 268. 10 Jur NS 507.
(3) 14 East, 601.
(4) 1 M. & S. 327.
(5) 9 Cl. & F. 583.
(6) 1 Burr. 229.
(7) 7 Ad. & E. 636.

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remainder fails from there being no particular estate to support it. The cases cited do not apply, being those of condition subsequent, such as the attaining a particular age, whereas here the contingency is wholly severed from the age or life of the persons to whom the interest is given.

Mr. *Freeman*, in reply.

SIR W. PAGE WOOD, V.C.:—

The question is, whether the estate vested in the children of *William Hall*, subject to be divested in the event of *William Hall* dying without leaving any child or children living at his death, or whether it is an interest in the children contingent upon *William Hall* dying in the lifetime of the testator's widow, the tenant for life, which contingency has not taken effect by reason of the tenant for life having pre-deceased *William Hall*. It is clear that in neither view could the children of *Jonas Wilman* take. The case was very ably argued by Mr. *Freeman*, who relied upon that class of cases where it has been held that upon a gift to *A.* when or if he shall live to attain twenty-one, followed by a limitation over in case he die under that age, the devise over is considered as indicating that he is to take all that is not given over in the given event, and that in such a case the interest vests immediately, though not absolutely and indefeasibly until *A.* attains twenty-one. But there is another class of cases, of which *Festing* v. *Allen* (1) (which, although it has been called in question (2), has not been overruled) is an instance, viz. that if you attach to a legatee a description so that the legatee cannot be ascertained but for that description, which contains in itself a contingency; then until the contingency happens you have no legatee to answer the whole of the requisite description, and no one to whom the doctrine laid down in *Edwards* v. *Hammond* (3), and that class of authorities, can apply. In all the cases cited in favour of vesting, the gift was to children on their attaining a particular age, and the only words of contingency were that, if the particular age was not attained, the estate was to go over, the effect of which was that, although the estate vested immediately, it did not vest inde-

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(1) 12 M. & W. 279. (2) See *Browne* v. *Browne* (3 Sm. & Giff. 568).
(3) 3 Lev. 132.

3 Jur N S 728

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feasibly until the particular age had been attained. But in this case the contingency which is introduced does not fit in with the prior interest given. *Doe* d. *Roake* v. *Nowell* (1) is always referred to by those who disapprove of *Festing* v. *Allen* (2). There, however, all the class was distinctly ascertained and indicated, and it would be going far beyond the authority of that case, or even *Browne* v. *Browne* (3), to hold in this case that the children took vested remainders liable to be divested in the given event. It is not here a gift to ascertained persons with a gift over, but there was a clear intention on the part of the testator that the class should not be ascertained until the death of *William Hall*, and that all those children who survived him (*William Hall*), and those only, should take. Unfortunately for the interests of the children, *William Hall* was not tenant for life, and has survived the person named by the testator as tenant for life, so that the particular estate to support the contingent remainder has dropped before the event on which the contingency depends has arrived. By treating it as a remainder vesting immediately in the children living at the death of the tenant for life, it might happen that those children might all die in the lifetime of *William Hall*, and yet be absolutely entitled, to the exclusion of after-born children who survived *William Hall*. That was the very class of events which was not intended by this testator. He meant to give to any children of *William Hall* whom he might leave living at his death. That was the particular period pointed out for ascertaining the class, and if no children of *William Hall* were then living, then the property was to go over to the *Wilman* family. I mention, lest it should be thought that I had overlooked it, the case of *Doe* d. *Bills* v. *Hopkinson* (4), which, at first sight, looks very like this case, but is not so in reality. There the devise was to *T.* and *W.* for life in equal moieties, and after their death the moiety of *T.* was given "to such child or children as he shall happen to leave, lawful issue, at the time of his decease, and to their, her, or his heirs and assigns for ever, to take in equal shares if more than one." The gift of *W.'s* moiety was in similar terms, and in case either *T.* or *W.* died

(1) 1 M. & S. 327, affirmed in Dom. Proc. (5 Dow. 202).

(2) 12 M. & W. 279.

(3) 3 Sm. & Giff. 568. 3 Jur NS 728

(4) 5 Q. B. 223.

without lawful issue, the moiety of him so dying was given to the survivor and to *J.* If both *T.* and *W.* died, and neither of them left issue, the whole was given to *J.* for life, and after his death to such children as he should leave at the time of his death. In case all three, *T.*, *W.*, and *J.*, should die without lawful issue, or if they, or any of them, should leave lawful issue, and such issue should depart this life under twenty-one and without lawful issue, then the property was given over. The Court there, looking to the whole will, held that the estate of each child (of *T.*) in remainder vested at birth, liable only to open and let in the interests of after-born children. It must be held in this case that the limitations after the death of *Mary Hall* to the children of *William Hall* were contingent limitations, and that, as the contingency has failed, *William Hall* takes the estate as heir-at-law of his father. As, therefore, the Plaintiffs are not entitled to any interest under the testator's will, the bill must be dismissed, and, as costs are not asked for, without costs.

Solicitors: Messrs. *Rogerson & Ford.*

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Jan. 17, 18, 22.

9 Eq 391,

DOBSON *v.* BOWNESS.

Will—Gift of "all the rest of my estate"—Real Estate held to pass.

A testator, by will, in 1808, after making specific bequests of freehold and leasehold estate, gave certain specific chattels, and bequeathed as follows:—"I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death," to trustees, "their executors, administrators, and assigns," upon trust for sale. He then made a bequest of his ready money, money arising from sale of lands, securities for money, and all sums due to him at his decease.

Testator was, at the date of his will, and at the time of his death, seised of certain freehold estate, which he did not mention in his will:—

Held, that such freehold estate passed by the words "all the rest of my estate."

The decisions in *Sanderson* v. *Dobson* (1) observed upon.

SEVERAL questions were raised in this suit, of which the only important one was the following:—

Thomas Stapylton, by his will, dated the 4th of October, 1808,

(1) 1 Ex. 141; 7 C. B. 81.

devised certain freehold and leasehold lands specifically, and then devised as follows:—

"I give unto my said sisters" (namely, *Margery* and *Martha Stapylton*) "my silver-hafted knives and forks and my silver table-spoons, equally to be divided between them; and I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death, unto the said *John Robson* and *Jonathan Sleigh*, their executors, administrators, and assigns, in trust as soon as conveniently may be to sell and dispose of the same, and to apply the money by such sale arising towards payment of my debts and the legacy hereinafter mentioned, and to pay the surplus, if any, to my said sisters, *Margery Stapylton* and *Martha Stapylton*.

Testator then made a bequest of property in the following terms:—"All my ready money, and the money arising by sale of my said premises at *Middleham*, to be received by my said trustees, securities for money, and all other sums or sum of money that may be due and owing to me at the time of my decease." He then made various specific bequests of furniture and chattels, and appointed *Robson* and *Sleigh* his executors.

Thomas Stapylton died on the 12th of October, 1808, having never been married. At the date of his will, and at his death, he was seised of certain freehold estate at *Leyburn*, not mentioned in the will.

Margery Stapylton married *Charles Sanderson;* and *Martha Stapylton* married *Matthew Dobson*.

On the 30th of June, 1845, a bill was filed by Mr. and Mrs. *Sanderson* against Mr. and Mrs. *Dobson* and their children, and the heir-at-law of the surviving trustee of the will of *Thomas Stapylton*, praying for a declaration of the rights of the parties under the will of *Thomas Stapylton*, and other instruments.

In 1847 the suit came on to be heard before the Master of the Rolls, Lord *Langdale*, who directed a case to be laid before the Judges of the Court of Exchequer, with the inquiry whether under the will of *Thomas Stapylton* any and what estate in the hereditaments at *Leyburn* passed to the devisees in trust therein named.

On the 10th of June, 1847, the learned Barons *Pollock*, *Alderson*, *Rolfe*, and *Platt*, certified their opinion that no estate or interest in the hereditaments at *Leyburn* passed to the devisees. The case is reported: *Sanderson* v. *Dobson* (1).

Upon this certificate being returned, his Lordship, not being satisfied with it, directed another case to be laid before the Judges of the Court of Common Pleas (2); and the learned Judges *Wilde, Maule, Cresswell*, and *Vaughan Williams*, on the 31st of January, 1849, certified their opinion that, under the will of *Thomas Stapylton*, the reversion in fee simple in the hereditaments at *Leyburn* passed to the devisees in trust in the will named (3). The grounds of the above judgment not appearing, a third case was directed by Lord *Langdale* to the Judges of the Court of Queen's Bench, but before any opinion was certified the case was compromised.

The conflicting decisions of the Courts of Exchequer and Common Pleas in *Sanderson* v. *Dobson* were observed upon by Lord *Campbell* in a case of *O'Toole* v. *Browne*, where his Lordship approved of the decision of the Court of Common Pleas, and observed that that of the Exchequer had been neutralized by it: see the report (4).

The bill in this suit was filed in March, 1866, and one of the questions involved was the same as that which had come before the common law Courts in *Sanderson* v. *Dobson*.

Mr. *Kay*, Q.C., and Mr. *Fry*, for the Plaintiff:—

The decision of Lord *Campbell* in *O'Toole* v. *Browne* is conclusive on the point, especially as in that case there was not, as here, any prior devise of real estate, which makes the decision stronger.

[They also cited *D'Almaine* v. *Moseley* (5).]

Mr. *Locock Webb*, Mr. *Babington*, Mr. *G. Williamson*, and Mr. *Lewis Morris*, appeared respectively for incumbrancers in the same interest as the Plaintiff.

Mr. *Bush*, for the assignee in bankruptcy of one of the Defendants.

Mr. *A. Dixon*, for the heir of the surviving trustee of the will of *Thomas Stapylton*.

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(1) 1 Ex. 141.

(2) 10 Beav. 478

(3) 7 C. B. 81.

(4) 3 E. & B. 572. 18 Jur 1113

(5) 1 Drew. 629. 17 Jur 872.

Mr. *Druce*, Q.C., and Mr. *Swanston*, for the principal Defendants, relied upon the reasoning of Chief Baron *Pollock* in the judgment in *Sanderson* v. *Dobson* (1).

Mr. *Kay*, in reply.

Jan 22. Sir W. Page Wood, V.C. :—

The question is, whether, by the terms of the will of *Thomas Stapylton*, the real estate passed. It was argued that it could not, on two grounds—one, that the words "estate and effects" were so mixed up with the words "household furniture, books, linen, and china," "goods and chattels," that they must be confined to matters of the same kind as those which had been previously described in the clause; and that this interpretation was corroborated by the gift being to trustees, "their executors, administrators, and assigns." The other ground appears to have been this—that in a subsequent part of the will there is a gift of ready money, sale moneys, and things of that sort, and it was considered that this circumstance was an indication of an intention that, in the particular clause I am considering, nothing but matters *ejusdem generis* should pass.

[His Honour then stated the effect of the decisions at common law, observing that he entirely concurred with the reasons given by the Court of Queen's Bench in *O'Toole* v. *Browne* (2), and continued :—]

The reasoning of the Court of Exchequer is not satisfactory in this respect. It seems to have been conceded on all sides as a general rule, that, with the view of giving effect to all the words of a will, you must give to the words, "all the rest of my estate," the effect of passing the real estate, if there be other words sufficient to pass the general personal estate. In this instance, the other words are quite sufficient of themselves to pass the personal estate. Moreover, if the view of the Court of Exchequer be correct, that the words, "all the rest of my estate and effects," must be confined to matters *ejusdem generis*, it would follow that a sum of stock would not have passed by "all the rest of my estate and effects,"

(1) 1 Ex. 141.

(2) 3 E. & B. 572. 18 Jan 1853.

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because that was not included in the class of things described. Nor do I think the circumstance of the testator having, after a residuary clause, made other bequests, is one of any importance; for we frequently see in wills that, after a complete disposition of real or personal estate, a testator, recollecting himself, makes some further bequests or legacies. That is a matter of very constant occurrence.

It is to be observed also, as Mr. *Kay* has pointed out, that the case of *O'Toole* v. *Browne* (1) is much stronger than this; for in *O'Toole* v. *Browne* there was no previous gift of any real estate; whereas here the testator has given some real estate, and some leasehold estate, and then winds up in words which appear to me to be intended to sweep in everything he had not given before. I do not think he intended to die intestate as to any part of his property. The circumstance of the gift being to persons, and "their executors, administrators, and assigns," is one to be considered, no doubt; but it becomes of less weight when there is a direction to the persons who are devisees to sell and dispose of the property and distribute the surplus. I have no doubt, therefore, that the sound conclusion is—that the *Leyburn* estate passed by the will of *Thomas Stapylton*, and went to *Margery* and *Martha* in equal moieties.

Solicitor for the Plaintiff: Mr. *R. T. Jarvis*, agent for Mr. *Wray*, *Leyburn, Yorkshire.*

Solicitors for the Defendants: Messrs. *Chilton, Burton, Yeates, & Hart*; Messrs. *Williamson, Hill, & Co.*; Messrs. *Hill & Hoyle.*

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(1) 3 E. & B. 572. 10 Jur 1113.

SEARBY *v.* TOTTENHAM RAILWAY COMPANY.

V.-C. W.
1868
Feb. 12.

Adverse Possession—Acts of Ownership—Site of Ditch—Statute of Limitations, 3 & 4 *Will.* 4, *c.* 27, *s.* 2.

13 Ch D 268
14 Ch D 538

A field adjoining a public road was separated from it only by a hedge and bank. It was held, as the result of evidence, that the trustees, who, under an Act of Parliament, constructed the road upwards of fifty years before the commencement of the suit, made the hedge and bank, and also made on the field side of the fence a ditch of three feet in breadth. This ditch had become filled up and obliterated, and had never been re-opened by the trustees; but a ditch about a foot wide had been subsequently made by the occupier of the field, and that also had become obliterated. The owners of the land had always included the hedge in their leases, and the tenants had held and used the strip within the hedge as part of their field for much more than twenty years, and had at their own expense trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch:—

Held, that these circumstances were not sufficient to constitute adverse possession, and give the owners of the land a title under the *Statute of Limitations* to the site of the three-feet ditch.

THIS suit was instituted by *Elizabeth Searby* and *James Wright*, the executor and executrix of *George Searby*, a builder, who died in 1864, and who, shortly before his death, had entered into a building agreement with the *Corporation of the Sons of the Clergy*, under which *Searby* was to pay a rent of £236 a year, and upon the completion of the messuages therein described was to have leases of the messuages for ninety-nine years.

The land comprised in the agreement was situate in the parish of *St. Mary, Islington, Middlesex*, on the south-east side of a road called the *Junction Road*. The land was described in the agreement as bounded by the road, and the plan was so drawn as to indicate that the fence was included in the agreement.

The Defendants were empowered to construct a railway, which crossed the *Junction Road*, and required the level of the road to be raised on an incline, so as to pass by a bridge over the railway. The Defendant company commenced building a retaining wall several feet thick at the foundation to support the incline. The part of this retaining wall, which was the subject of the suit, was beyond the limits of deviation of the company, and the Plaintiffs

Bulsen 13 Ch D. 268. 271

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alleged that it was built on land the property of their lessors, and included in their building agreement. The Defendants insisted that the site of the wall belonged to the road trustees.

The bill was filed on the 28th of October, 1864, to restrain this alleged encroachment, and at the hearing, the evidence being imperfect, an inquiry was directed, whether the site of the wall belonged to the lessors of the Plaintiffs or to the road trustees. A certificate was made, and the case now came on upon motions to vary it by Plaintiffs and Defendants. A vast amount of conflicting evidence was gone into, of which, for the purposes of this report, which relates only to a single point on the *Statute of Limitations,* it is only necessary to state what follows:—

The Plaintiffs insisted that there had never been a ditch made by the road trustees on the field side of the hedge, but the Court, on the evidence, arrived at the conclusion that the road trustees, in constructing their road about fifty years ago, had made the hedge, and also a three-feet ditch on the field side of the hedge, that the hedge and ditch were then the property of the trustees, and that, the ditch having become obliterated, the wall had been built mainly upon the site of this three-feet ditch. Evidence was given on behalf of the Plaintiffs that their lessors had always included the hedge in their leases, and the former tenant who and whose father had successively occupied the field for forty-two years prior to the Plaintiffs' occupation, gave evidence that the site of the wall extended beyond the inner limit of the hedge on to land which was "held and used by his father and himself, as tenants of the *Sons of the Clergy*, for forty-two years." He also stated that long after the road was made he had cut a one-foot ditch inside the hedge. There was evidence that this ditch also had long since become obliterated, and that only traces of it were discoverable. The tenant also stated that he and his father had, at their own expense, trimmed the hedge on both sides during the whole of their tenancy, and that no claim was made by the trustees either to the hedge or any land within it. There was counter-evidence shewing that, in the earlier part of the forty-two years, the trustees had entered into contracts for the repair of the hedge along their road, but there was no trace of any such contracts for much more than twenty years before the present dispute arose. It was also in evidence that houses had been built on the site of the hedge and ditch, in the same field in which the wall was constructed, less than one hundred yards from the end of the wall, and that the road trustees had not interfered; but these houses were much less than twenty years old.

Mr. *Druce*, Q.C., and Mr. *Hemming*, for the Plaintiffs:—

Supposing that the trustees originally made a three-feet ditch which was obliterated more than twenty years ago; that the tenant cut a one-foot ditch on part of the site, and that this has also long since become obliterated; it is not disputed that the tenants had the use of the site of the alleged three-feet ditch as freely as any other part of their field, and further, that they, at their own expense, kept the hedge in repair. Whatever may be the effect of repairing a hedge for more than twenty years, the actual user of the site of an old ditch as part of a field, whether for the grazing of cattle or any other purpose to which the field was put, is sufficient after twenty years to establish a statutory bar. It is true that until within the last few years this field was only used for agricultural purposes; but the fact that the site of the ditch was held and used in this way by the tenant without any interference by the trustees is sufficient to bar the trustees under the *Statute of Limitations.* If not, a statutory title can never be acquired to land which has once been the site of a ditch.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *Townsend*, for the Defendants.

Mr. *Druce*, in reply.

SIR W. PAGE WOOD, V.C. (on this part of the case, said):—

I cannot understand how the *Statute of Limitations* can apply to a case of this description, where no adverse act has been done, for the trimming the hedge, or clipping the hedge, by the tenant now and then cannot be said to be an act adverse to the trustees. All that the trustees had to do was to see that the road was properly repaired, or repair it themselves, to see that cattle could not get upon the road, and to see that the ditch was properly kept. It is

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said that they did not do that. If the ditch were there, no doubt cattle would drink from it, and if the ditch became by degrees filled up, cattle would graze upon that, just as much as stray cattle would graze upon the bank on the other side of the road. But to say that the circumstance of cattle wandering over this ditch is an act of adverse right, so as to raise the *Statute of Limitations* against the trustees, seems to me to be a contest which there is no authority to justify. It would be quite different if there had been any building on the *locus in quo*, but there was no building there, and no house in any other part of this field except some which have stood but a few years. I cannot infer from anything which has been said that as to this particular *locus in quo* there have been any adverse acts. The circumstance of the tenants mending the fence is not an adverse act against the trustees. The law allows the owner of the field or property on the other side to have possession of his field. The law does not insist upon his putting an inner fence against the ditch; it would not prevent his cattle from drinking at the ditch, and, when filled up, it would not prevent them from grazing upon it. For the purpose of bringing in the *Statute of Limitations* there must be some adverse act or right set up against these trustees, and I do not see that any adverse act has been committed. If they had originally the right, I cannot see that anything has been done to deprive them of it.

Solicitor for the Plaintiff: Mr. *James Bell.*
Solicitors for the Defendants: Messrs. *H. & W. Toogood.*

In re COWBRIDGE RAILWAY COMPANY.

V.-C. W.

1868
Jan. 21.

Law of Judgments Amendment Act (27 & 28 *Vict.* c. 112)—*Judgment Creditor—Summary Remedy—Prior Elegit.*

A judgment creditor who has caused a writ of *elegit* to be issued, is not entitled to apply to the Court upon Petition in a summary way for a sale of his debtor's lands under 27 & 28 Vict. c. 112, s. 4, where his debtor's lands have been already extended and delivered to another judgment creditor under a prior *elegit*, although he is not prevented by the Act from filing a bill to assert his equitable rights.

6 Eq 620,-1,-2
8 Eq 228
702,-3,-7
1 Ch. 81
9 Ch 231,-2,-
235
17 Eq 436
9 Ch D 279
281
11 Ch D 696
13 Ch D. 256

THIS was a Petition under sect. 4 of 27 & 28 Vict. c. 112, by two contractors, who had recovered judgment against the *Cowbridge Railway Company*, and obtained a writ of *elegit*, praying for a sale of the interest of the company in the lands and hereditaments extended by the Petitioners, and application of the proceeds in payment of the debt due to the Petitioners, and costs of the application.

On the 29th of May, 1867, the Petitioners recovered judgment against the company for £13,753 17*s.* 3*d.*, and on the 31st of May they caused a writ of *elegit* to be issued on their judgment to the sheriff of *Glamorganshire*. By the inquisition taken on the 16th of November, 1867, in pursuance of the writ of *elegit*, it was found that the railway company, on the day of taking the inquisition, had no goods or chattels in the bailiwick of the sheriff, and that the company, on the 29th of May, 1867, the day of obtaining the Petitioner's judgment, were seised in fee of certain freehold and copyhold lands (specifying them) on which the line of railway of the company was laid down, with the several sidings, yards, and appurtenances thereto belonging and connected therewith, together with the stations, sheds, railway, and buildings erected and built on some part thereof, being of the clear yearly value of £500 in all issues, beyond reprizes, which lands the sheriff on the day of taking the inquisition had not delivered to the Petitioners by a reasonable price and extent, the same having been already extended and delivered to the registered public officer of the *National Provincial Bank of England* under a previous writ of *elegit*, dated the 15th of May, 1867, and had also been further ex-

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tended, but not delivered, under another writ of *elegit* at the suit of Sir *Ivor Guest*, dated the 16th of May, 1867. And it was further found that the railway company, on the day of taking the inquisition, had not, nor had any person or persons in trust for them, at the time of the rendition of the said judgment (29th of May, 1867), or at any time afterwards, any other or more lands, tenements, rectories, tithes, rents, or hereditaments in the bailiwick of the said sheriff to the knowledge of the jurors in the said inquisition.

The Petitioners had registered the writ, and the registry of such writ was still in force. In their affidavit in support of the Petition they stated that none of the lands comprised in the said inquisition were surplus lands.

Mr. *W. M. James*, Q.C., and Mr. *Rowcliffe*, in support of the Petition:—

The only consistent construction to be given to the words of sect. 1, "actually delivered," is, that the writ has been executed by the sheriff, or something of that sort, as it never could have been intended, by an Act passed for the purpose of extending, and not of lessening, the remedies of judgment creditors, that a judgment should lose its effect against every property of which the sheriff could not deliver actual possession; as, for example, an equity of redemption in a freehold or leasehold estate, which cannot be extended. Further than this, sect. 5 of the Act can have no operation if "actually delivered" is to be construed literally, as that section speaks of charges "whether prior or subsequent to that of the Petitioner." If a judgment creditor cannot have a charge until the land has been delivered to him in execution, then a subsequent judgment creditor could have no charge, as the land cannot be delivered to him in execution after possession has been given to the first judgment creditor by the sheriff: *Carter* v. *Hughes* (1); *Thornton* v. *Finch* (2).

[They asked for an order in the same form as that which was made in *Gardner* v. *London, Chatham, and Dover Railway Company, Ex parte Grissell* (3); and also referred to *In re Bishop's Waltham Railway Company* (4).]

(1) 2 H. & N. 714.
(2) 4 Giff. 505.
(3) Law Rep. 2 Ch. 385.
(4) Ibid. 382.

Mr. *W. Pearson,* for the company :—

The Petitioner has no charge upon the lands comprised in the inquisition. The Act is as express as express can be; and until the Petitioner has brought himself within sect. 4, as a creditor to whom "any land of his debtor shall have been actually delivered," he is not entitled to the summary remedy given by the Act, by which it was in no way contemplated that subsequent judgment creditors should obtain the right of summarily disturbing judgment creditors who are in possession by virtue of a prior *elegit.* But in any case, the Petitioner has shewn by his own affidavit—"None of the lands comprised in the said inquisition were superfluous lands"—that there are no lands of the company which this Court can order to be sold for the purpose of satisfying his judgment, and no order can be made upon this Petition; the only real property in which a railway company has a saleable interest being its superfluous lands not actually used for the purposes of the undertaking: *In re Bishop's Waltham Railway Company* (1); *In re Hull and Hornsea Railway Company* (2); *Potts* v. *Warwick and Birmingham Canal Company* (3).

Mr. *A. T. Watson* appeared for the *National and Provincial Bank,* but as they had not been served, the Court declined to hear him.

Mr. *W. M. James,* in reply.

SIR W. PAGE WOOD, V.C. :—

There is some difficulty in knowing what the Legislature meant by saying that the land must be absolutely delivered in execution; but there is nothing in the Act to shew that this expression is equivalent to saying that the writ must be delivered to the sheriff. I cannot agree that the Act was intended to enlarge the rights of judgment creditors. The object, as stated in the preamble, was "to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances," and consequently it was provided that actual execution should be necessary in both

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(1) Law Rep. 2 Ch. 382.

(2) Law Rep. 2 Eq. 262.

(3) Kay, 142.

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cases. It seemed probable that what was intended by the Legislature was, that, as in the case of chattels, some active steps must be taken by the judgment creditor before the writ binds the property, so with respect to land, actual execution shall be necessary before the judgment affects it. It is curious, however, to find that, while actual delivery of the land is rendered necessary, the word "land" was, by sect. 2, stated to include—that which was not capable of actual delivery—"all hereditaments, corporeal or incorporeal, or any interest therein;" thus, under the statute 1 & 2 Vict. c. 110, a great number of charges might be created and co-exist, although they might not be realized by execution or *elegit*, and the operation of such a writ was not extended by the present Act.

8 Eq 702
9 Ch 234
11 Ch D 696

It could not have been intended that all the remedies given by 1 & 2 Vict. c. 110, should be swept away by a side wind. The intention must have been simply that all those remedies which a judgment creditor can effect by means of a writ of *elegit* must be exercised by him before he can come in under the Act. The term "actual delivery" must, however, have some meaning given to it, and it is very difficult to give it any such meaning, or to hold that the Petitioner is entitled to the benefit of the statute which enables every creditor "to whom any land of his debtor shall have been actually delivered" to obtain from the Court, "upon Petition in a summary way, an order for the sale of his debtor's interest." Such an order in the present case would be directly opposed to the statute. But then it is said that if the Court does not accede to this Petition it would be sweeping away the whole charge of these judgment creditors, and leaving them without a remedy, simply because there was a prior judgment creditor in the field, and that sect. 5, which contemplates that there may be other judgment creditors in priority to the Petitioner, would fail of effect. Such, however, will not be the necessary consequence of refusing to make an order upon a Petition circumstanced like the present. What was the position of all those persons who, before the statute in question, found legal obstacles in the way of their enforcing their charge? The present Petitioners are in much the same position, as they could not enforce their judgment, from finding a prior creditor by *elegit* in possession of the land. A bill must be filed to remove the legal obstacle; but the practice of this Court is not to

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assist creditors in removing these obstacles until they have themselves done all they can at law. For instance, they are obliged to sue out their writ even in the case where the debtor's estate is a mere equity of redemption, and therefore incapable of extension.

The rule of the Court on this point was considered by Vice-Chancellor *Turner* in *Smith* v. *Hurst* (1), where he cites from Lord *Redesdale's* Treatise on Pleading the following passage (2):— "Courts of equity will also lend their aid to enforce the judgments of Courts of ordinary jurisdiction; and therefore a bill may be brought to obtain the execution or the benefit of an *elegit* or a *fieri facias*, when defeated by a prior title, either fraudulent or not, extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In any case, to procure relief in equity the creditor must shew by his bill that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to of an *elegit* and *fieri facias*, he must shew that he has sued out the writs, the execution of which is avoided, or the Defendant may demur." The case of the present Petitioners is like that mentioned by Lord *Redesdale*. In consequence of the operation of the statute an obstacle stood in their way, viz., the possession of another judgment creditor. This prior title not extending to the whole interest of the debtor, although it prevented the presentation of a Petition under the statute, cannot prevent the filing of a bill. For surely the words in the 1st section of the Act, that no judgment shall affect any land until such land shall have been actually delivered in execution, cannot be extended so far as to prevent the filing a bill for asserting good equitable rights. They may file their bill to redeem, and when they have got rid of the prior *elegit*, the obstacle in their way, they can come here by Petition under the statute.

11 Ch D 690
15 Ch D 256

As matters now stand, not being able to obtain an actual delivery of the land from the sheriff, who has extended it, and delivered it under such extent to a prior judgment creditor, they are not entitled to present this Petition; but there will be no difficulty in their asserting their equitable rights by bill, and when the legal impediment is removed out of their way, then they may

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(1) 10 Hare, 30. 17 Jur 30

(2) 10 Hare, p. 48.

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present their Petition under sect. 4 of the Act. The present Petition must be dismissed with costs.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*; Messrs. *Vizard, Crowder, Anstie, & Young*.

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Ex parte CORPORATION OF LONDON.

Lands Clauses Act, s. 69—Re-investment in Land—Several Companies—Surveyor's Fee.

On a petition for re-investment in land of moneys paid in by several companies and public bodies, under sect. 69 of the *Lands Clauses Act*, the surveyor's fee was ordered to be borne by the several companies and public bodies rateably, according to the amount of the funds invested by them.

THIS was a Petition by the Corporation of *London* for investment of moneys under sect. 69 of the *Lands Clauses Act*, in the purchase of certain freehold and leasehold lands in the city of *London*.

The moneys had been paid into Court under the Act, as the purchase-moneys of lands of the corporation, which had been taken by several public bodies and companies.

A sum of money had also been paid into Court by the corporation in respect of the leasehold interest in certain lands of which the corporation themselves were reversioners in fee, the lands being required and authorized to be taken by them under the provisions of the *Holborn Valley Improvement Act* (27 & 28 Vict. c. lxi.)

The Petition prayed that the purchase-money for this leasehold interest might also be paid out of the moneys in Court.

Mr. *A. E. Miller*, for the Petitioners, in support of the last-mentioned part of the prayer, referred to *Ex parte Corporation of Sheffield* (1).

He also submitted that the surveyor's fee, like the *ad valorem* stamps, ought to be paid by the several Respondents and the corporation, as representing the trustees of the *Holborn Valley Im-*

(1) 21 Beav. 162. 2 Jur. N.S. 31

provement Fund, rateably, according to the amounts of the funds invested.

Mr. *C. Hall,* for the Metropolitan Board of Works.

Mr. *L. Field,* for the Commissioners of Works.

Mr. *Kekewich,* for the *London, Chatham, and Dover Railway Company.*

Mr. *Osler,* for the *Charing Cross Railway Company.*

SIR W. PAGE WOOD, V.C., said, that as to the purchase of the leaseholds he should follow the case of *Ex parte Corporation of Sheffield* (1), in which the Master of the Rolls had considered a leasehold interest to be "an incumbrance" within the 69th section.

The costs of the Petition must be borne by the companies in equal shares, as in *Ex parte Bishop of London* (2), but the surveyor's fee, like the *ad valorem* stamps on the conveyances, must be borne by the companies and public bodies rateably.

Solicitor for the Petitioners: Mr. *T. J. Nelson.*

Solicitors for the Respondents: *The Solicitor to the Board of Works;* Messrs. *Field, Roscoe, & Co.;* Messrs. *Freshfields;* Messrs. *H. & W. Toogood.*

(1) 21 Beav. 162. 2 Jur. N.S. 31. (2) 2 D. F. & J. 14. 6 Jur. N.S. 640

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March 2, 3.

5 Ch 354
15 L J 970

In re ORIENTAL COMMERCIAL BANK.

BARGE'S CASE.

Companies Act, 1862, ss. 25, 153—*Winding-up—Loan or Payment upon Shares.*

The directors of a bank, then in an insolvent condition, proposed to their shareholders that the holders of £10 shares, on which £7 had been paid, should advance £3 on this alternative: viz., if the bank should be able to go on the advance was to be treated as a loan at 10 per cent. interest, while if the bank were wound up, the advance was to be taken as paid upon shares in anticipation of calls. On the day that this proposal was made a friendly Petition was presented by one of the directors, on which (and two others) an order was ultimately made for winding up the company:—

Held, that the presentation of this Petition rendered the arrangement come to on the same day invalid under sect. 153 of the *Companies Act*, 1862, as being an "alteration in the *status* of the members of the company made between the commencement of the winding-up and the order for winding up," and that shareholders who had made the advance with full knowledge of the presentation of the Petition were not entitled to adopt the alternative of treating it as paid upon their shares in anticipation of calls.

Semble, that the arrangement was also invalid under sect. 25, as the money advanced had not been entered on the register as "an amount paid or agreed to be considered as paid on the shares."

THIS was a summons adjourned from Chambers upon an application by *Edward Barge*, a holder of 200 shares in the *Oriental Commercial Bank, Limited*, that credit might be given to him for the sum of £400, paid by him to the bank on the 7th of June, 1860, in anticipation of calls, as so much money paid by him on account of the call made by the liquidator of the bank on the 12th of December, 1866.

On the 18th of May, 1866, Mr. *Barge*, who was the holder of 200 shares on which £7 per share had been paid, attended a special meeting of the shareholders, convened by circular signed by the general manager of the bank. At this meeting it was proposed by the directors that the shareholders should pay in advance to the bank £3 per share or less, according to their means, on account of capital remaining unpaid upon their respective shares. Upon these advances the shareholders were to be allowed a discount of 10 per cent. for two months, and in the event of the bank receiving a sum of £87,000 advanced to the *Financial Corporation*, and the bank being able to go on, the advances were to be repaid in two months. If, on the other hand, the bank should be obliged to suspend business, then the shareholders were to be credited with the advances made by them as and in part payment of any calls of unpaid capital which might be made upon their shares. A resolution in favour of this proposal was carried. On the 7th of June Mr. *Barge* advanced to the bank, by cheque, £395 5*s.* 9*d.* (being £400 less 10 per cent. discount for two months), relying, as he stated in his affidavit, upon the terms of the arrangement that his advance would be accepted as a payment in anticipation of calls. Before paying the money Mr. *Barge* discovered that a Petition had been presented for winding up the company, and on applying to the manager, was told that the Petition (which was, in fact, presented on the 18th of May) had been presented in the interest of the bank by a friendly Petitioner, as a precautionary measure against hostile proceedings on behalf of creditors, and that the bank would in all probability be able to resume its business.

The receipt given to Mr. *Barge*, and dated the 7th of June, 1866, was for "the sum of £400, being amount advanced to this bank on loan as per resolution of 18th May, 1866, less interest allowed to 14th July, 1866."

The bank was unable to recover itself, and on the 16th of July an order was made by Vice-Chancellor *Wood* on the Petition of the 18th of May, and also on two other Petitions, presented on the 5th of July, for its compulsory winding-up; but on the 4th of August the Lord Chancellor directed the winding-up to be voluntary under supervision of the Court. A call having been made by the official liquidator on the 12th of November, 1867, Mr. *Barge* claimed to be entitled to deduct from the amount payable by him under this call the sum advanced by him in June, 1866, and the question now came before the Court upon summons adjourned from Chambers.

Demetrio Pappa, the late manager of the bank, had made an affidavit in support of Mr. *Barge's* application, in which he stated that the proposal was made by the directors in pursuance of and in reliance upon powers conferred by the articles of association, in the following terms:—

"The company may, if the directors deem it expedient to do so, receive from any of the shareholders willing to advance the same all or any part of the moneys due upon their respective shares beyond the sums actually called for, and upon the moneys so paid in advance, or so much thereof as may from time to time exceed the amount of calls then made upon the shares in respect of which such advance shall have been made by the company, may pay such interest as may be agreed upon between the shareholders paying such sum in advance and the directors."

Mr. *Pappa* proceeded to state that, as manager, he received the advance from *Barge* as a payment made by him on account of the amount remaining unpaid upon his shares; that the bank had at the time suspended payment; and that the payment could not be considered as a loan, but was, in fact, received by the directors as a payment in satisfaction of the capital remaining unpaid upon the shares held by *Barge*.

In his affidavit, filed in opposition, the official liquidator stated that *Barge*'s name appeared in the books of the bank as a creditor for the advance of £400; but that this sum did not appear anywhere in his share account, nor was there any record of it in any of the share or transfer books, or share registers of the bank. The liquidator also stated that on the 26th of February, 1867, *Barge* called at the office of the bank, and told *Ferrier*, clerk to the liquidator, that the £400 was not an advance on account of calls, but a temporary loan to assist the bank out of its difficulties. A letter written by the liquidator to *Barge* on the 5th of March, 1867, stated:—

"I find in the books of the bank a sum of £400 standing to your credit in anticipation of calls."

It was explained, however, that this was a mistake of the clerk, who had written the letter of the 5th of March (in the name of the liquidator) under a misapprehension.

Mr. *G. M. Giffard*, Q.C., and Mr. *Speed*, in support of the application:—

The arrangement, which was, in effect, that if the company went on the payment was to be treated as a loan and repaid out of the money coming from the *Finance Corporation*, but that if it was necessary to suspend business and wind up the bank, then the payment was to be treated as an advance made upon shares in anticipation of future calls, was perfectly within the powers of the company, especially having regard to the 25th clause of the articles of association.

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the official liquidator, and Mr. *Eddis*, for the creditors' representative:—

Whatever might have been done by the directors if there had been no proceedings pending for winding up the bank, any arrangement of this sort made after the presentation of the winding-up Petition is invalid, being in direct contravention of the *Companies Act*, 1862, s. 153, which provides, "Where any company is being wound up . . . all dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the *status* of the members of the company made between the commencement of the winding-up and the order for winding up, shall, unless the Court otherwise orders, be void."

But apart from the winding-up Petition, to treat the money advanced as a payment upon shares would be in direct contravention of sect. 25 of the *Companies Act*, which requires, that upon the register of members shall be entered not only the names, &c., of the members and the shares held by them, but also "the amount paid, or agreed to be considered as paid, on the shares of each member." There is no entry in the register of this amount as having been paid upon the shares; and, consequently, having regard to that section, the transaction cannot be treated as a payment upon shares in anticipation of future calls. Further than this, the payment of 10 per cent. interest shews conclusively that it was a mere loan, and nothing else.

Mr. *Giffard*, in reply:—

The winding up of the company had not commenced when the resolution was passed; and the mere presentation of a friendly Petition for that purpose on the same day that the resolution was passed, and, for anything that appears in the evidence, after the passing of the resolution, does not bring the case within the operation of sect. 153, especially having regard to sect. 83, from which

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it is clear that the "presentation" means the answering of the Petition. But in any case an arrangement by which payments are made in anticipation of calls is not an "alteration in the *status* of the members" within the meaning of sect. 153, those words referring to a transfer for the purpose of avoiding liability, and not to an arrangement by which the money available for creditors is obtained at an earlier period. With respect to sect. 25, Mr. *Barge* was entitled to assume that the books would be properly kept; and if this had been the case, his shares would have been credited with the amount as a payment in respect of future calls. He cannot be allowed to suffer because the directors have neglected their duty.

Sir W. Page Wood, V.C.:—

This case has been very ably argued; but it appears to me, I confess, on the whole, that the transaction cannot be upheld in the alternative form in which Mr. *Barge* desires to put it. The original contract resulted from a proposal made on the 18th of May, on which very day the Petition for winding up the company (which I assume to have been presented immediately after the meeting) was presented. At the meeting it was proposed that those who had paid up to the extent of £7 on their shares should, according to their ability, advance £3 per share, or less, for the purpose of enabling the company to see if it could not prolong its business until a sum, expected to be received, of £87,000, should come in from the *Financial Corporation*, which sum, if received, would, as they imagined, enable them to carry on the affairs of the company prosperously. At the same time a Petition appears to have been presented as a friendly precaution on the part of the directors, in order to protect all persons who might come into this arrangement, and prevent any hostile Petition being presented. Ultimately, on that Petition so presented, among others, an order for winding up was made; and of course, for the purposes of the Act, everything must be referred back to the presentation of the Petition on the 18th of May. When the Petition was presented Mr. *Barge* was not bound by anything. Before making the advance he appears to have been desirous of knowing what the state of facts was; and in reply to his inquiry, he was told that the Petition was a mere precaution, without any notion that it would be prosecuted, but to prevent the intervention of any person hostile to the company. The proposition on which he advanced his money was alternative. If the company can go on, or can get the £87,000, the payment shall be taken as a loan, and the loan shall be at the rate of 10 per cent. interest. If, on the other hand, the company cannot go on, and must be wound up, then it shall be taken as so much money paid on account of shares. It was so far a singular part of the arrangement, that the payment was to be 10 per cent. Money being then at that rate, and being required for an immediate emergency, it would be most reasonable that for that emergency 10 per cent. should be paid. But there was no such good reason if matters turned out badly for the concern, and the money was to be taken as a payment in advance on shares, that such a rate should be paid; but I do not think that this would afford a ground broad enough for deciding the case.

The difficulty that arises is, how far such a bargain as this is a legitimate bargain to be made by the shareholders, having regard to sects. 25 and 153 of the *Companies Act*. Now sect. 25 requires, evidently for the benefit of creditors, that the directors shall give the names, addresses, and occupations of all members, and shall cause an account to be kept of the amount paid, or agreed to be considered as paid, on the shares of each member. That I take to be directory, that a person should not lose the amount he had paid on the shares because the directors had not chosen to make the entry. How far or not a shareholder would be bound, after a reasonable time, to see that his shares were properly entered (having regard to some of the decisions as to applications for shares, and the like), may be a question hereafter. For the present, nothing of that kind arises, and I do not hold this gentleman in any way answerable for the return not having been made in the manner here described. But the question at once arises, how far this agreement that the advance shall be treated as a loan if the company goes on, and as paid upon shares if it fails, is properly within the scope of the Act, regard being had to sect. 25. It seems like an agreement on the part of the person advancing the money, that his shares shall be treated as paid-up, and he shall not be liable to future creditors if the thing does not go on;

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whereas if the thing does go on he is to be treated simply as a lender of the money, and have it returned with 10 per cent. interest. It comes exceedingly near to the case of a man agreeing that his name shall not be put upon the register as a holder of paid-up shares. Some reliance was placed upon the words, "agreed to be considered as paid up," as in those cases of which the *Richmond Hill Hotel Case* (1) is an instance, where persons supplying goods to the company were to be considered as holders of paid-up shares, though the full amount was not actually paid upon them. So here it was urged that an entry of this description might have been made in the share ledger: "There is agreed to be paid up upon these shares £3 per share, subject to the company being wound up in a given time," so that all the world would be told that they cannot trust to these gentlemen having unpaid shares, for they are to be taken as paid-up shares if the company is wound up in a certain specified time. That is the most favourable way in which the case can be put for Mr. *Barge*, but I confess I have very great doubts whether such a scheme as that would not be a scheme for evading the true purport of the Act. Still there is this to be said for it, that it is a means of paying existing creditors, and that any creditors who might come in when the winding-up occurred would be *pro tanto* relieved. At present I have great doubt upon the subject, but the inclination of my mind is against the validity of the transaction upon that footing. But, having regard to sect. 153, I am quite clear that the transaction cannot stand. That section prohibits all dispositions, where any company is being wound up (and by sect. 84, the winding up of a company by the Court "shall be deemed to commence at the time of the presentation of the Petition"), unless the Court otherwise orders. Of course it is open to the Court to say that the transaction, when a fair one, may stand, and it is possible that this judicial discretion was given to the Court for the express purpose of meeting the difficulty which otherwise would arise from the very large description contained in the previous words. Otherwise not a single bill could be negotiated, the whole business of a bank would be stopped, and the ruin of the concern safely effected upon the mere presentation of a Petition, from whatever motives of malignity. To avoid any such extreme construction of the section, it seems to have been thought desirable that the Court should have this large discretion given. Referring to the words of the section, I cannot think that these two sets of words, "every transfer of shares or alteration in the *status* of members of the company," can be properly limited to the transfer of shares alone. Two things are pointed out, a transfer of shares, and an alteration in the *status*. Now, what can be a greater alteration of *status* than this arrangement, by which the holder of shares on which £3 remains to be paid is to be treated as having paid up in full? Then, as to using any discretion in the matter, I must take Mr. *Barge* to have known that a Petition had been presented which might end in a winding-up, and I must also take him to have known the law that no transaction between him and the company which would have the effect of altering his *status* could stand, "unless the Court should otherwise order." Of course the Court would not make the order if he does everything with his eyes open. He took his chance, he thought the concern would go on, he was told the Petition was only to avoid any hostile proceedings, and to have the thing in their own hands if it should be necessary. Knowing all this, he took his chance, and made his bargain, by which, if the Petition went on, he was to be treated either as having advanced money as a creditor of the company, or as a shareholder with fully paid-up shares, at his option. In answer to which he is met by sect. 153, under which he cannot, after the concern is being wound up, make this bargain, by which he is placed in the advantageous position of balancing between being a creditor for money lent to the company, and being a shareholder with fully paid-up shares. It seems to me that this is a case actually struck at by sect. 153, being a dealing with his *status* during the unsettled position of the company, and just one of those things which the section was passed to avoid. He seems to have had a strong notion of that, because he two or three times claimed it as a loan. I am satisfied that, with knowledge of the presentation of the winding-up Petition, he advanced his money on the chance of being able to treat it in the alternative, but with a perfect knowledge, also, that an order might be made on that Petition. If the order had been made simply on another Petition,

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(1) Law Rep. 2 Ch. 511, 527 (*Elkington's Case* and *Pellatt's Case*).

I should have had to consider the case on sect. 25 alone, but it being made upon that Petition, I do not think it was competent to make this bargain without the sanction of the Court, and I do not think it would be right to give that sanction when the applicant was doing it with his eyes open. The claim must, therefore, be disallowed, and the summons dismissed.

[His Honour added, that if this was to be treated as a model case, and other shareholders in the same position would (subject to the right of appeal) consent to be bound by this order, he should not make Mr. *Barge* pay the costs.]

Solicitors: Messrs. *Wild & Barber*; Messrs. *Uptons, Johnson, & Upton.*

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Feb. 20, 22.

In re BOWRON, BAILY, & CO.

BAILY'S CASE.

Company—Rectification of Register—Application for Shares—Delay in Allotment—Locus Pœnitentiæ.

In October, 1866, *A.* received from a private source a document purporting to be a prospectus of a company then about to be formed, upon which he applied for ten shares, and paid the required deposit to the bankers named in the document. In January, 1867, *A.* received the authentic prospectus of the company, which differed in many important particulars from the document first seen by him. On the 1st of February, the directors met for the first time, and proceeded to allot the shares, among other persons, to *A.* On the 7th of February (whether before receiving his letter of allotment or afterwards, was left uncertain by the evidence) *A.* wrote to decline taking any shares, requesting a return of the deposit paid by him in October; and in a subsequent letter expressed his determination not to take any shares in the company, whether allotted to him or not. No further communication took place between *A.* and the company until October, 1867, when legal proceedings were threatened in case the arrears of call were not at once paid:—

Held, that having regard to the four months' interval between the application for shares and the allotment to him, *A.* was entitled to a *locus pœnitentiæ*, and that it was not too late for him on the 7th of February (assuming him to have received the letter of allotment on the 3rd) to reconsider the matter and repudiate the shares.

Affd by L.C. 3 Ch 592.

MOTION on behalf of the Rev. *Johnson Baily*, under sect. 35 of the *Companies Act*, 1862, for an order that the register of shareholders of *Bowron, Baily, & Co., Limited,* might be rectified by striking out his name therefrom.

In October, 1865, Mr. *Baily* received a communication from his father (since deceased) informing him that a limited company was being promoted by his cousin, *Charles Baily,* for the purpose of taking over the business of a private trading firm of glass bottle manufacturers at *Stockton-on-Tees,* and inviting him and his sisters to take shares in the company, which was represented as then formed and about to be incorporated, and at once commence business. This letter was accompanied by a document purporting to be a prospectus of the proposed undertaking. On reading this document, and in the belief that the business of the company would commence immediately, and that an allotment of shares would be made on the 14th of October, 1865—the statement being, "No allotment of shares will be made before the 14th of October." Mr. *Baily,* on the 6th of October, signed an application for ten shares, and at the same time sent a cheque for £10 as deposit money (£1 per share) to the persons named in the prospectus as bankers of the proposed company, for which he received a banker's receipt, dated the 7th of October, 1865.

In January, 1866, Mr. *Baily* received by post a second prospectus of "*Bowron, Baily, & Co., Limited,*" differing in many important particulars from the prospectus first sent to him, but agreeing with the articles of association.. It appeared that the directors met for the first time on the 1st of February, and proceeded to allot the shares that had been applied for, and, according to the evidence of the secretary, a letter allotting ten shares to the Rev. *Johnson Baily* was posted to him on the 2nd of February. The evidence, however, was conflicting upon this point, as Mr. *Baily* stated that he did not receive the letter of allotment until the 9th.

On the 7th of February, not being disposed to take shares in a company constituted upon the terms mentioned in the second prospectus, and having, as he stated, received no notice of any allotment of shares, Mr. *Baily* wrote to Messrs. *Bowron, Baily, & Co.*:—"I have made up my mind to decline taking any shares in the company of *Bowron & Baily, Limited.* I therefore have to request that the £10 I paid Messrs. *Backhouse & Co.* be returned to me, as I shall refuse to take any shares if allotted to me."

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On the 9th of February Mr. *Baily* received a letter from the secretary, stating: "As the shares were allotted last week, your application is too late." According to Mr. *Baily's* affidavit the secretary's letter enclosed a printed form or letter of allotment, dated the 1st of February, 1866; but it was, on the other hand, asserted by the secretary in his affidavit that the letter of allotment was posted to Mr. *Baily* on the 2nd of February.

Within three days from receipt of the secretary's letter Mr. *Baily* replied as follows:—"The only reply I have to make to your letter with regard to my taking ten shares in the proposed company of *Bowron, Baily, & Co., Limited,* is that I have made up my mind not to have any shares in the company, whether allotted to me or otherwise, and by that decision I intend to abide."

Notice of a call of £2 per share, dated the 14th of February, was sent to Mr. *Baily,* but he took no notice of it, and heard nothing more from the company until November, 1866, when a printed copy of the proceedings at the ordinary general meeting of shareholders announcing a dividend of 10 per cent. to the shareholders was sent to him. Mr. *Baily* took no notice of this announcement, and had never received or applied for any money on account of this or the subsequent dividend. In October, 1867, he received a letter from the secretary demanding the arrears due upon his shares, with interest, and threatening a forfeiture of the shares and legal proceedings in default.

Under these circumstances Mr. *Baily* moved that the register might be rectified by omitting his name therefrom.

The affidavit of the secretary, filed in opposition to the motion, stated that the prospectus of the company was issued on the 10th of December, 1866, and not before, and that, although certain proofs of the prospectus, before it was finally settled, were struck off for the private use of the provisional directors, they were never issued to the public, or intended to be, and that the sending of a proof to Mr. *Baily* was unauthorized.

The secretary also stated that on the 2nd of February, 1866, he signed a letter of allotment for ten shares, put it into an envelope addressed to Mr. *Baily,* and gave it to one of the clerks to post. No entry was made in the register of any shareholders' names

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until the 9th of February, for the sole reason that the register book was not ready.

It appeared from the books of the company that Mr. *Baily* had not been credited with the amount of the dividends declared.

Mr. *Druce*, Q.C., and Mr. *Osborne Morgan*, in support of the motion:—

Mr. *Baily's* contract to accept shares was not complete until the allotment was communicated to him: *Hebb's Case* (1); *Bloxam's Case* (2); and according to his affidavit, his letter of the 7th of February, repudiating the shares, was written before he received any notice of allotment. But, even assuming that he must be taken, according to the secretary's statement, to have received the letter of allotment on the 3rd of February, he is not bound to accept the shares allotted when the allotment is not made within a reasonable time after the application: *Ramsgate Victoria Hotel Company* v. *Montefiore and Goldsmid* (3).

Mr. *Baily* is also entitled to be relieved from his shares on the ground of material variation between the first prospectus, on the faith of which he made his application, and the second, sent to him in January, 1866. If it is said that no prospectus was properly issued until December, 1865, and that that prospectus alone states the objects of the company, then his application in October, being based upon an unauthorized document issued by mistake, and relating to a merely inchoate company, was a nullity, and failed altogether.

[The VICE-CHANCELLOR:—Can he, after his right to withdraw has been disputed, remain without taking any steps for nearly two years, and then assert that he is not a shareholder? *Lawrence's Case* (4) shews that a person may lose his right to have his name removed from the register when, with knowledge of his position, he takes no step within a reasonable time.]

In *Lawrence's Case* the contract was clearly established. But where a man's name is placed upon the register without shadow of

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(1) Law Rep. 4 Eq. 9.
(2) 33 L. J. (Ch.) 574. 10 Jur NS 833. 4 De G J & S 447
(3) Law Rep. 1 Ex. 109. 12 Jur NS 455.
(4) Ibid. 2 Ch. 412.

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pretence, or where, having agreed to take shares in a company with certain advertised objects, shares are allotted to him in a company having quite different objects, there is no contract, and the *onus* is on the company to shew that his name ought to be retained upon the list: *Stewart's Case* (1); *Pellatt's Case* (2). As soon as any intention of enforcing the call against Mr. *Baily* was announced by the company, he at once served them with notice of the present application.

Mr. *Kay*, Q.C., and Mr. *Fry*, for the company:—

Mr. *Baily* must be taken to have received the letter of allotment before he wrote repudiating the shares, and therefore was not entitled to withdraw his application. But in any case, so long as he allowed his deposit-money to remain at the bankers, it cannot be said that a reasonable time between application and allotment had expired. In the *Ramsgate Hotel Case* (3) the delay was five months. Here it was only four months, and Mr. *Baily* knew when he applied for shares in October, 1866, that the company was not actually formed, and might not proceed to allot shares for some time; and he was in no way damnified by the delay.

As to any misrepresentation, we deny it; but, even assuming that the variation between the two documents would be sufficient to avoid the contract, the first prospectus was a mere private document, imperfect on the face of it, and not put forward by the directors or by their authority, and consequently Mr. *Baily* is not entitled to say that he has been defrauded by the company so as to entitle him to have his name removed from the register: *Ayre's Case* (4); *Nicol's Case* (5); *Lindley* on Partnership (6). Mr. *Baily*, if he objected to the constitution of the company as stated in the authentic prospectus, ought at once, "or at the very latest when he received his allotment of shares"—*Peel's Case* (7)—to have applied to have his name removed; and after allowing his name to remain on the register for nearly two years after allotment, his application is much too late.

(1) Law Rep. 1 Ch. 574. 12 Jur NS 755
(2) Ibid. 2 Ch. 527.
(3) Ibid. 1 Ex. 109. 12 Jur NS 455
(4) 25 Beav. 513. 4 Jur NS 596
(5) 3 De G. & J. 387. 5 Jur NS 205
(6) 2nd Ed. p. 1381, *et seq.*
(7) Law Rep. 2 Ch. 674, 684.

SIR W. PAGE WOOD, V.C.:—

This case comes near those in which the applicant has not come with sufficient promptitude to the Court, but is not quite within the line.

At the time when Mr. *Baily* applied for his shares and got a receipt for the deposit-money from the persons named as bankers of the company, on behalf of the company, there was no company formed, and no prospectus issued according to the view now put forward by the company; though how this gentleman should have come to know that there were bankers ready to receive deposits for shares in this intending company, one does not quite see, upon the company's theory. Take it, however, that Mr. *Baily* happened to know, from having all this information, which I assume to be merely private, sent to him by his father. When he saw the real prospectus he would have a *primâ facie* case for withdrawing his application. From October until January, 1866, nothing appears to have been done; but in January Mr. *Baily* received a paper which was the real prospectus; and here arose my only doubt—whether on reading this paper, which one sees at once is something very different in its terms from the first document sent to him, Mr. *Baily* ought not at once to have withdrawn his application. Upon the view put forward by the company in the evidence of their secretary, it was on the 3rd of February that he received notice of the allotment of shares to him; and on the 7th he wrote requesting that his application might be withdrawn. *Ramsgate Victoria Hotel Company* v. *Goldsmid* (1) is a very strong authority for giving a man a *locus pœnitentiæ* where there has been a very long interval between the application for shares and the allotment of them; in other words, where the allotment is not made within a reasonable time, the applicant is not bound to accept the shares. Considering that the application was made on the faith of that which on the company's view was a mere inchoate statement, this case is considerably stronger than *Goldsmid's*, and Mr. *Baily* on receiving the paper in January, which might lead him to suppose that the inchoate company was about to be actually brought forward, might then have repudiated his application. Then, is the repudiation made by him on the 7th of February too

(1) Law Rep. 1 Ex. 109. 12 Jur. N.S. 455.

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late? I think not, when one looks at the circumstances. Nothing whatever was done by the company until the 1st of February. On the 3rd of February he received the secretary's letter, and then clearly he had notice of the allotment. None of these shares, however, were registered until the 8th of February, and on that day the secretary receives Mr. *Baily's* letter repudiating the shares. Nothing could reasonably have been done between the 3rd and 8th that could have the effect of misleading creditors (by seeing Mr. *Baily's* name on the register), and on the authority of *Goldsmid's Case* (1), withdrawing as he did within four days after the announcement of the allotment, made four months after his application in that which was a merely inchoate company, I hold that it was not too late for him to reconsider the question and repudiate the shares. He adhered to his withdrawal in his letter of the 11th or 12th of February, and clearly put himself at arm's length with the company, having attended no meeting and paid no call, and no further communication took place between him and the company until November, 1867. I threw out a doubt as to whether he had not lost his right by taking no further step during the interval; but *Pellatt's Case* (2), and *Hebb's Case* (3), satisfy me that so long as a person has rejected the shares it is not his business to get his name taken off the register.

Solicitors: Messrs. *Wood, Street, & Hayter*; Messrs. *Sharp & Ullithorne*.

(1) Law Rep. 1 Ex. 109. 12 Jur N S 545 (2) Law Rep. 2 Ch. 527.
(3) Law Rep. 4 Eq. 9.

HERBERT *v.* BARRETT.

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Jan. 16.

Practice—Plea—Replication—Subpœna to hear Judgment—Dismissal for want of Prosecution—Cons. Ord. XXI., *Rule* 1; *Cons. Ord.* XXXIII., *Rule* 10.

Where a Defendant has filed a plea as to part, and an answer as to the rest of the bill, and the Plaintiff has filed a replication to the plea, the suit is "a cause" within the meaning of Rule 1 of Cons. Ord. XXI., and of Rule 10 of Cons. Ord. XXXIII., which empowers a Defendant, in the cases therein specified, to move to dismiss the bill for want of prosecution.

THIS was a motion to dismiss for want of prosecution.

The bill was filed on the 4th of January, 1867, and on the 13th of February the Defendant pleaded a plea as to part, and an answer to the rest of the bill. The plea went, in effect, to the substance of the whole bill.

On the 1st of March, 1867, the Plaintiff served the Defendant with an undertaking to reply to the plea, and on the 2nd of March replication was filed. The time for closing evidence expired on the 2nd of November, and on the 29th of November the cause was set down in the cause book.

Upon the occasion of this being done, the Registrar's clerk who entered the cause suggested to the clerk of the Plaintiff's solicitor that, before he took the Registrar's note upon which to found a subpœna to hear judgment, he should consult counsel as to whether a subpœna was necessary, and whether the cause was properly set down. Accordingly counsel was consulted, and advised that a subpœna was not necessary, and it was not obtained.

The Plaintiff's solicitor, upon being served with the present notice of motion, dated the 8th of January, 1868, wrote to the Defendant's solicitor, stating the difficulty as to the practice, and offering, if he would assent, to take any course he might point out to put the matter right for hearing, as well as to pay 20*s.* for the notice of motion.

To this the Defendant's solicitor replied that he could not withdraw the notice of motion.

Mr. *Riddell* (with him Mr. *G. M. Giffard*, Q.C.), for the motion.

Mr. *W. H. Terrell*, for the Plaintiff:—

The motion is misconceived, for it is clear that during the pendency of a plea no motion to dismiss can be made: *Smith's* Chancery Practice (1). Nor is a subpœna to hear judgment necessary where a suit is at issue merely by replication being filed to a plea.

No doubt, if a suit which is at issue in this manner be "a cause" within the 10th rule of Order XXXIII., the Defendant is right. But even then he might have set down the cause.

The VICE-CHANCELLOR said he thought there ought to have been a subpœna to hear judgment on payment of the 20*s*.

Mr. *Riddell*, in reply:—

No special replication is necessary to a plea. Directly replication is filed to a plea the cause is at issue.

SIR W. PAGE WOOD, V.C.:—

Some possible doubt may arise upon the orders, but I think the reasonable construction of them is this:—

According to the 2nd article of the 10th rule of Order XXXIII., where a Defendant has filed a plea to the whole bill, the Plaintiff must file his replication within four weeks of his having undertaken so to do. Here the Defendant pleaded in effect, though not in form, to the whole bill; and the Plaintiff filed his replication within four weeks of his undertaking. Thereupon, in my judgment, the cause became at issue, and then the 1st rule of Order XXI., and the 3rd article of the 10th rule of Order XXXIII., became applicable. Within four weeks after evidence closed the Plaintiff must serve a subpœna to hear judgment. This, however, was not done.

The Plaintiff, no doubt, says—and the statement is not denied—that he was misled as to the proper course of practice by some information he got at the Registrars' office, and he then wrote, offering to take any step that might be assented to to set the matter straight, and to pay 20*s.*; but the offer was not acceded to.

Considering what has taken place, and the offer that was made, I think the justice of the case will be met by my empowering and directing the Plaintiff to issue subpœna to hear judgment at once, on payment of 20*s.* by way of costs of this motion.

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(1) 7th Ed. p. 468.

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Solicitor for the Plaintiff: Mr. *T. Horrex.*
Solicitors for the Defendant: Messrs. *Ward, Mills & Witham.*

OTHER *v.* SMURTHWAITE.

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5Ch 462

Practice—Evidence—Facts or Issues—Vivâ voce Evidence at the Hearing—Order of 5th of February, 1861, *Rule* 3.

The right of a party to a suit in which issue has been joined to have the evidence in the cause taken *vivâ voce* at the hearing, is confined to cases where the facts and issues sought to be established are capable of being distinctly and concisely specified.

In a suit against a manager and a shareholder of a bank charging fraudulent withdrawals of, and speculations with, the bank moneys, an application by the Plaintiff that the evidence might be taken *vivâ voce* at the hearing as to the following facts and issues—whether or not the Defendants executed the instruments of transfer in the bill mentioned; whether they received any dividend warrants or other payments in respect of the securities referred to in the bill; and whether or not they were the proprietors of, or interested in, such securities,—was refused, as leading the Court to an unlimited inquiry, and as being unjust to the Defendants in not sufficiently stating the case to be made against them.

THIS was an application by the Plaintiff, on summons adjourned from Chambers, for an order, under the 3rd rule of the Evidence Order of the 5th of February, 1861, that "the evidence in chief as to the undermentioned facts and issues in the above cause may be taken *vivâ voce* at the hearing of the cause, that is to say, whether or not the Defendant *Leonard Cooke*, and the Defendant *Thomas Smurthwaite*, and *Isaac Fisher*, in the said bill mentioned, or any or either of them, executed the several instruments of transfer in the Plaintiff's bill of complaint filed in this cause mentioned or referred to, or any or either of them; and whether the said *Leonard Cooke*, and *Thomas Smurthwaite*, and *Isaac Fisher*, or any or either of them, received any dividend or interest warrants, or other payments, in respect of the shares, stocks, bonds, and other securities referred to in the said bill, or any of them; and whether or not the said *Leonard Cooke*, and *Thomas Smurthwaite*, and *Isaac Fisher*, or any or either of them, were the proprietors or proprietor of, or interested in, the several stocks, shares, bonds, and other securities in the said bill mentioned, or any or either of them."

The bill was filed by *Christopher Other*, as one of the registered public officers of the *Swaledale and Wensleydale Banking Company*, against *Thomas Smurthwaite* and *Leonard Cooke*, stating that for many years prior and down to August, 1854, the manager of the bank was *Isaac Fisher;* that upon *Fisher's* death in that month the Defendant *Thomas Smurthwaite* succeeded him as manager, down to the 30th of December, 1864, when he resigned his office; and that the other Defendant, *Leonard Cooke*, was a shareholder in and customer of the bank; and alleging fraudulent speculations on the part of *Fisher*, *Smurthwaite*, and *Cooke*, with the bank moneys.

The history of the transactions alleged by the bill (which was filed originally on the 7th of February, 1866, and had been twice amended), was briefly this: that in December, 1864, the chief clerk of the principal office of the bank, at *Richmond*, called the inspecting director's attention to the state of "The Sundry Account," to the debit of which there stood a balance of £42,722 10*s*. The inspecting director immediately called upon *Smurthwaite* to prove this balance, and *Smurthwaite* admitted that this sum represented the aggregate of various moneys which had been taken from the coffers of the bank during his and *Fisher's* management, and as securities for which he held certain shares and certificates. These, upon investigation, were found to amount in value to £25,174 18*s*. By a letter, dated the 7th of January, 1865, *Smurthwaite* acknowledged that a sum of £11,450 7*s*. 7*d*. was due from him to the bank for interest on the above balance. At this time *Smurthwaite* alone was thought to be liable for the above balance and interest; but the Plaintiff having discovered that certain books had been kept back by *Smurthwaite* containing entries and accounts relative to speculations of *Cooke*, *Smurthwaite*, and *Fisher*, as partners, and to moneys taken from the bank for such partnership, filed this bill, and on the 24th of February, 1866, obtained an order for their production.

It now appeared that the aggregate moneys withdrawn from the bank from the 11th of June, 1845, to the 26th of November, 1864, amounted to £51,970 3*s.* 9*d.*, the items of which sum were entered in the books to the debit partly of accounts kept in the name of *Cooke*, and partly of "The Sundry Account;" and that sums amounting to £9469 5*s.* 4*d.* were from time to time paid into the bank in part satisfaction of the above amount, being moneys that were realized on the sale of certain shares and stocks, some of which were registered in the name of *Cooke* alone, and others in *Smurthwaite's* name alone.

The Defendant *Cooke* asserted, that his liability to the bank ceased, and his partnership with *Smurthwaite* was put an end to, in April, 1855. He also disputed the execution of certain transfers stated to have been executed by him. He further relied on the *Statute of Limitations.*

Mr. *G. M. Giffard,* Q.C., and Mr. *Locock Webb,* in support of the summons:—

It will be necessary for the Plaintiff to cross-examine *Cooke* as to his execution of certain documents, as to the persons to whom certain dividend warrants were sent, by whom the money was received, and so on; and the proper officers of the various banks and railway companies must be subpœnaed.

One of the defences is the *Statute of Limitations.* Hence it is necessary for us to prove fraud.

[The VICE-CHANCELLOR suggested that the better way would be for the Plaintiff to take certain paragraphs of the bill, and say he wished to have those proved *vivâ voce;* and the application stood over to see if this could be accomplished, but without success.]

Feb. 22. Mr. *Giffard,* in continuation:—

In the first place there will be a saving of expense, as these witnesses will not be obliged to attend twice—first before the Examiner, and again at the hearing. In the second place it will obviate the mischief of putting into the Defendant *Cooke's* hands the exact case which is to be made against him. In the third place the Court will arrive at the exact interest, meaning of course the beneficial interest, which *Smurthwaite* and he had in these stocks and shares.

Mr. *Bagshawe,* for the Defendant *Cooke*:—

The charges in the bill relating to these matters are too vague and numerous. They run over some forty-three paragraphs of the bill. The facts and issues are not "specific," as required by the order. The Court will be involved in a roving inquiry of interminable length.

We shall not know what part of the case is to be supported by *vivâ voce* evidence, and what not. It will be trying the whole cause upon *vivâ voce* evidence. Some of these shares are in an American railway, others are in the hands of a bank, who refuse to give them up except under an order of the Court. No expense will be saved as to the others.

It is surely a strong argument against the application that the Defendant *Cooke* will be kept in ignorance of what charges against him are to be persevered in, and what not. The Plaintiff is not to be allowed to isolate part of his case, and say he will proceed upon that only.

A *subpœna duces tecum* will accomplish all the Plaintiff wants.

Mr. *Kekewich,* for the Defendant *Smurthwaite*:—

The matters mentioned in the third part of the application are not the subject matter of issues; what is sought are, in truth, inquiries. They cannot be "distinctly and concisely specified" as the order directs. The use of the order is to give the Court an opportunity of informing itself in certain special cases.

Mr. *Giffard,* in reply:—

There is no necessity for any special case to be made. It is the right of the suitor to have the whole of the evidence in the case taken *vivâ voce,* if he pleases. Written evidence has in many instances, especially where fraud is charged, been found to be unsatisfactory. It is a mistake to suppose that it is the duty of the Court to answer the matters mentioned in the order. The Plaintiff may choose his course, either to file replication or to proceed by motion for decree; but directly issue is joined, either the Plaintiff or the Defendant may avail himself of the order, and have the whole of the evidence taken *vivâ voce.*

Sir W. Page Wood, V.C. :—

When this matter was first opened, and I saw the number of things proposed to be proved *vivâ voce,* I confess I was much surprised that the notion could be entertained that it was a case falling within this order.

If the case could have been brought within reasonable compass, and made in any sense manageable, I should have been very glad that what the Plaintiff desires as the mode of trying the case should be conceded to him. But the more one endeavours to ascertain and limit what it is, the more one sees that what the Court is asked to embark in is an interminable inquiry. The last question, for example, is as to the interest of the Defendants, and *Isaac Fisher*, or any or either of them, in these stocks and shares. The justification of it is this—that the Plaintiff is not required beforehand to tell the Defendants what sort of interest he is going to prove. But that would be a roving inquiry.

Mr. *Giffard* puts one particular case as to the receipt of dividends. Undoubtedly the question whether or not Mr. *Cooke* did receive any dividends may be treated as an issue of fact, and might be tried accordingly. But the rest is a roving inquiry as to anything that may be pointed out by the witnesses throughout the whole course of the evidence.

On behalf of the Plaintiff it is said that he is not bound to let the Defendants know beforehand, or give them any chance of knowing beforehand, what he contemplates proving. But if there be any one thing more contrary to the course of our proceedings in equity than another, it is the taking an opponent by surprise. If I were to find the Defendant taken by surprise, I should certainly direct the case to stand over, in order that he might have an opportunity of meeting the case made against him. Although it is fraud that is charged, fraud must be distinctly charged and properly proved. So far from its being the principle that a Defendant is to be allowed to be taken by surprise, and, without any preparation, is to be called upon to meet something which a

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witness may assert, nothing is more settled than the doctrine that when you charge fraud you must state the facts upon which you allege fraud, and prove them strictly. Until Lord *Cottenham*, in *Attwood* v. *Small* (1), qualified that doctrine, a Plaintiff was required to state every single written document or admission he intended to insist upon, or he was not allowed to give it in evidence. The doctrine is now modified; but the present rule is exactly contrary to the theory, that it is desirable to surprise the party charged. The Court now says, a Plaintiff may give in evidence an admission or a letter which he has not stated; but if the Defendant is surprised the Court will give him an opportunity of offering an explanation of it. Here there is a general charge as to the Defendant's interest. An issue is sought as to that; and if the Plaintiff were to produce a number of witnesses to say that the Defendant had received such and such dividends, instead of permitting such evidence to be given to startle the Defendant, I should certainly let the case stand over to allow the Defendant an opportunity of shewing how the dividends were received, or for what purpose, or how the thing came to pass.

I apprehend that the cases to which the order was really intended to apply are those where the party applying has distinct issues which can be stated in the summons as facts to be proved, not where he seeks inquiries. The only difference that I can see between a fact and an issue is this:—an issue is that which the Plaintiff avers, and the Defendant contradicts; a fact is something which the Plaintiff avers, and the Defendant ignores—something of which he says he is ignorant, and cannot say whether it is true or not, and to which he must put the Plaintiff to proof. That may, perhaps, in one sense of the word, be called an issue also, inasmuch as the Defendant says, "I neither admit nor deny the statement. I leave it to you, the Plaintiff, to make out your own case." I think the order was meant to apply to this sort of case. [His Honour read the order.]

No one can say that the issues, in this instance, are distinctly and concisely specified. It is not the fault of the pleader. No one can state distinctly and concisely the matters here sought to be inquired into, extending to all the transactions mentioned in about twenty or thirty paragraphs of the bill; and there is this extreme inconvenience attending this rambling inquiry, that, as to anything comprised in the facts and issues, it would be very difficult to know what is and what is not comprised in those issues as to the interest of these parties. After these issues affidavit evidence must not be gone into, so that a Defendant, not knowing what particular interest it is that the Plaintiff is about to attempt to prove, will abstain as far as he can from giving any evidence at all on the subject matter. The Defendants will go to the hearing in utter ignorance of what it is the Plaintiff proposes to prove, on the simple allegation that they have some interest.

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(1) 6 Cl. & F. 232.

So far from an application of this sort being a matter of course, it is distinctly provided that the summons is to be taken on notice, which, of course, implies the possibility of opposition to it. The Judge is to make the order, unless he is satisfied that the application is unreasonable. The order seems to point out a course which, upon concisely specified facts and issues, may be adopted. It assumes, *primâ facie*, that in a case so situated it is reasonable to have the fact or issue tried at the hearing. But even in that state of things the Judge may think the application unreasonable. In this case, where these matters cannot be put in a concise form, but must be put in this extremely roving, wild, and vague form, the application does seem to me in the highest degree unreasonable.

The difficulty which was suggested about the books really comes to nothing. It is a question of expense, but it is only the expense of getting the attendance of these gentlemen from the various railway companies for one day during the hearing. Information from them can be had just as well by filing interrogatories out of Court. The Plaintiff may have a subpœna, and if they refuse to answer, he can come to the Court and complain of their refusal. If they are entitled not to answer, the Court will protect them here just as much as it would before the Examiner. The only suggestion of increased expense is, that it will be necessary to summon them again at the hearing; but that can be dealt with afterwards.

I must dismiss this summons; the costs to be reserved till the

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hearing, unless the case shall be otherwise disposed of, in which case they will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *Robinson & Chapman, Leyburn, Yorkshire.*

Solicitor for the Defendant *Smurthwaite:* Mr. *H. F. Wood.*

Solicitors for the Defendant *Cooke:* Messrs. *Slee, Middleton, & Ovans,* agents for Messrs. *J., W. & C. Hunton, Richmond, Yorkshire.*

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Jan. 31.

SWANSEA CANAL PROPRIETORS *v.* GREAT WESTERN RAILWAY COMPANY.

Private Bill Costs Act (28 *Vict. c.* 27), *ss.* 1, 3, 5—*Certificate of Taxing Officer—Injunction—Jurisdiction.*

The *Private Bill Costs Act* provides (sect. 5) that the validity of such a certificate of costs as that prescribed by the Act "shall not be called in question in any Court."

Where a certificate of costs had been obtained from the taxing officer, certifying that two promoters of a private bill were the parties liable to pay a sum of costs, and the taxation of such costs had been made in the absence of, and without notice having been given to one of such promoters; the certificate being regular in point of form, and consequently not assailable at common law:—

Held, that the Court of Chancery, in exercise of its jurisdiction to set aside judgments obtained by fraud, had, notwithstanding the above enactment, jurisdiction to restrain an action commenced upon such certificate against the promoter (who had no notice); and that the other promoter was not a necessary party to the suit.

THIS was a demurrer for want of equity and want of parties.

The bill was filed by the *Company of Proprietors of the Swansea Canal Navigation* against the *Great Western Railway Company,* stating in effect as follows:—

The Plaintiffs, who were incorporated by Act of Parliament for the purpose of making and maintaining a navigable canal from *Swansea* to *Ystradgunlais,* in the county of *Brecon,* entered into an agreement to cede their undertaking to the *Neath and Brecon Railway Company* for a term of 999 years from the 1st of July,

See 3 Ex 158.

1866. A bill was brought into Parliament to carry out the agreement, the Plaintiffs joining in the petition with the *Neath and Brecon Company* for the sake of conformity only, and doing nothing in support of it, either by attending before the committee or otherwise.

In the early part of the year 1866, the *Neath and Brecon Company* having fallen into difficulties, asked to be released from their agreement, and on the 18th of April, 1866, the Plaintiffs consented to this.

On the 19th of April, the Lords' Committee sat to consider the bill; upon which occasion Mr. *William Bell*, acting as Parliamentary agent of the *Neath and Brecon Company* (but not acting in any way for the Plaintiffs), stated that the promoters did not intend to proceed with the bill, and asked leave to withdraw it. Several opposers, however, applied to the committee not to allow the bill to be withdrawn, but to declare the preamble not proved. Thereupon the committee declared the preamble not proved, and ordered that the following parties should be entitled to recover their costs from the promoters:—The *Ystalyfera Iron Company*, the *Great Western Railway Company*, Messrs. *Vivian & Sons*, and Messrs. *William Foster & Co.*

On the 13th of July, 1866, the Plaintiffs' solicitor was served with a bill of costs, charges, and expenses "incurred in relation to the petitions of the *Great Western Railway Company* and the promoters of the *Swansea and Clydach Railway*, against the *Swansea Canal Transfer Bill*." This bill of costs was signed by Messrs. *Bircham, Dalrymple, & Co.*, who had opposed the bill on behalf of the *Swansea and Clydach Railway Company*, and by Messrs. *Young, Maples, Teesdale, & Nelson*, who had opposed on behalf of the *Great Western Railway Company;* but it was not sealed with the seal of, nor did it purport to be signed on behalf of, either company.

On the 5th of March, 1867, the taxing officer of the House of Lords certified the amount of costs due to the Defendants from the *Neath and Brecon Railway* and the Plaintiffs at £139 17*s.* 8*d.*; but did not certify by whom they were to be paid.

For this sum and costs the Defendants, in November, 1867, commenced an action against the *Neath and Brecon Company* and the Plaintiffs; and judgment for want of plea was signed on the

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16th of December. On the 20th of December, however, on a summons calling on the Defendants to shew cause why the writ of summons and judgment should not be set aside, on the ground that the certificate did not direct payment to be made, either by one company or the other, this judgment was set aside by Mr. Justice *Byles*.

On the 24th of December, 1867, the Defendants obtained a second certificate from the taxing officer, certifying that the *Neath and Brecon Company* and the Plaintiffs were "the parties liable" to pay the above sum of costs to the Defendants.

Another action against the two companies had been commenced by the Defendants on the new certificate.

The bill charged that the alleged certificate of December, 1867, was a nullity, inasmuch as the officer had no parliamentary power to grant a new certificate in place of an informal one, or to amend a certificate after it had been once made.

It further alleged that the Defendants did not obtain taxation within six months after the report of the committee, and did not give the Plaintiffs any notice of any appointment before the taxing officer; that the Defendants had never delivered any bill of costs save as above stated; that the only bill which they professed to have delivered was a joint bill on behalf of themselves and the promoters of the *Swansea and Clydach Company*, to whom no costs were given by the committee; that the Defendants had never made a proper demand for their alleged costs, nor delivered a proper bill, as required by the statute; that they intended to sign judgment in the action on the new certificate as for want of plea by *nil dicit*; and that the Plaintiffs had no legal defence to the action.

The bill also alleged that it was a fact, and that the Defendants admitted it to be a fact, that the rights of the Defendants against the *Neath and Brecon Company* were distinct from their alleged rights against the Plaintiffs; and that the *Neath and Brecon Company* were not necessary or proper parties to the suit.

The bill prayed for a declaration that the alleged certificate of the 24th of December, 1867, was not authorized by the statute, and was of no avail against the Plaintiffs, and not binding against

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them; and for an injunction to stay the action, and from commencing any other action, until the provisions of the statute had been complied with (1).

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(1) The following are the material sections of the Act:—

"1. When the committee on a private bill shall decide that the preamble is not proved, or shall insert in such bill any provision for the protection of any petitioner, or strike out or alter any provision of such bill for the protection of such petitioner, and further unanimously report, with respect to any or all of the petitioners against the bill, that such petitioner or petitioners has or have been unreasonably or vexatiously subjected to expense in defending his or their rights proposed to be interfered with by the bill, such petitioner or petitioners shall be entitled to recover from the promoters of such bill his or their costs in relation thereto, or such portion thereof as the committee may think fit, such costs to be taxed by the taxing officer of the House as hereinafter mentioned, or the committee may award such a sum for costs as they shall think fit, with the consent of the parties affected."

"3. On application made to the taxing officer of the House by such promoters or petitioners, or by their solicitors or parliamentary agents, not later than six calendar months after the report of such committee, and in cases where no sum shall have been named by the committee, with the consent of the parties affected, not until one month after a bill of such costs shall have been delivered to the party chargeable therewith, which bill shall be sealed with the seal or subscribed with the proper hand of the parties claiming such costs, or of their solicitor or parliamentary agent, the taxing officer shall examine and tax such costs, and shall deliver to the parties affected, or either or any of them, on application, a certificate, signed by himself, expressing the amount of such costs, or in cases where a sum for costs shall have been named by the committee, with the consent as aforesaid, such sum as shall have been so named, with the name of the party liable to pay the same, and the name of the party entitled to receive the same, and such certificate shall be conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same from the party therein stated to be liable to the payment thereof; and the party claiming under the same shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same."

"5. The party entitled to such taxed costs, or such sum named by the committee, with such consent as aforesaid, or his executors or administrators, may demand the whole amount thereof, so certified as above, from any one or more of the persons liable to the payment thereof, and in case of non-payment thereof on demand, may recover the same by action of debt in any of Her Majesty's Courts of Record at *Westminster* or *Dublin*, or by action in the Court of Session in *Scotland*. In such action it shall be sufficient, in *England* or *Ireland*, for the Plaintiff to declare that the Defendant is indebted to him in the sum mentioned in the said certificate; and the said Plaintiff shall, upon filing the said declaration, together with the said certificate and an affidavit of such demand as aforesaid, be at liberty to sign judgment as for want of plea by *nil dicit*, and take out execution for the said sum so men-

Mr. *Druce*, Q.C., and Mr. *Wickens*, for the demurrer:—

Either the certificate is in conformity with the provisions of the statute, in which case its validity cannot be called in question "in any Court" (sect. 5); or it is not, in which case the Plaintiffs can as before take out a summons before a common law Judge, to have it set aside.

At all events, the *Neath and Brecon Company* are necessary parties.

Mr. *Kay*, Q.C., and Mr. *Crossley*, for the bill:—

This certificate was obtained behind the backs of the Plaintiffs. Even a judgment of a Court of competent jurisdiction obtained under such circumstances will not be allowed to stand: *Thorburn* v. *Barnes* (1); and a certificate cannot be placed higher than a judgment.

As to the want of parties, the *Neath and Brecon Company* may have no ground of complaint against the Defendants. Their case, at any rate, stands in a different position from ours.

Mr. *Druce*, in reply:—

The question is plainly one that ought to be tried at law.

Sir W. Page Wood, V.C.:—

I find this matter placed by the Act of Parliament in a very singular position.

Certain precise directions are laid down by the 3rd section as to the preparation of the certificate, and very fair and proper directions they seem to be, if I may be permitted to say so:—[His Honour read the 3rd section.]

Now it is clear that these provisions were not complied with in this instance. The bill of costs delivered to the Plaintiffs was neither sealed with the seal of the company nor properly signed; nor was the amount properly demanded.

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tioned in the said certificate, together with the costs of the said action, according to due course of law: Provided always, that the validity of such certificate shall not be called in question in any Court."

(1) Law Rep. 2 C. P. 384, 401.

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Then we come to the 5th section:—[His Honour read the section.] It is plain that the certificate alone would not make costs payable by anybody. Nobody was specified in it as being liable to pay, and accordingly the judgment which was obtained upon it was set aside by the Judge's order.

Then a new certificate was obtained; and as, by the 5th section, the Court of law is made a passive instrument for giving effect to the certificate, if the certificate be right in point of form, the Plaintiffs can have no relief at law.

Then the Plaintiffs' case is, that this certificate was obtained behind their backs, without notice being given to them; in other words, that it was a fraud upon them.

I am of opinion that it was a fraud upon the Plaintiffs on the part of the Defendants to arm themselves with an instrument obtained in such a way as this; and acting upon the principles of jurisdiction exercised by this Court in cases of judgments obtained by fraud, I cannot allow the Defendants to proceed in this action.

As to the objection for want of parties, the Plaintiffs would have been much embarrassed if they had been obliged to bring the *Neath and Brecon Railway Company* before the Court. That company will not be affected by any decree made in this suit, and I do not see that any injustice is likely to result from their absence.

I must overrule the demurrer.

The injunction was moved for and obtained on a subsequent day.

Solicitors for the Plaintiffs: Messrs. *Wrentmore & Son*, agents for Messrs. *Jones & Curtis, Neath.*

Solicitors for the Defendants: Messrs. *Bircham, Dalrymple, Drake, & Co.*

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Feb. 21, 24, 25, 28.

6 Eq 967. 8
7 Eq 277.
11 Eq 69
6 Ch. 268.
16 Eq 367. 370 378
8 Ch 1050
17 Eq 536
20 Eq 390
1 Ch Div 19.
18 Ch D. 171

CLINCH *v.* FINANCIAL CORPORATION.

Company—Amalgamation—Articles of Association—Companies Act, 1862, s. 161—*Ultrà Vires—Charges of Fraud—Costs.*

Company *A.* was registered in December, 1863, for undertaking financial operations; by the articles it was stipulated that the limitation of the liability of shareholders should be unalterable; and power was given to the directors "to amalgamate with, or purchase, or acquire" the business and property of any company formed to carry on any business included in the objects of company *A.* Company *B.* was registered in December, 1864, with the object of carrying on banking and financial operations, and "any further objects which the company might from time to time adopt." In March, 1865, an agreement was come to between the respective directors for the amalgamation of the two companies, upon the terms that the shareholders of company *A.* were to be bound to take 25,000 shares of company *B.* at £6 per share (to be credited as £5), such sum of £150,000 to be paid for out of the assets of company *A.*, and if they were insufficient, by a call on the shareholders of company *A.* By resolutions passed at an extraordinary general meeting of company *A.*, held in April, 1865, it was resolved that the amalgamation should be effected, pursuant to the terms of the agreement, and that company *A.* should be wound up:—

Held, that such attempted amalgamation was not within the powers of the directors of company *A.*, either under their articles, or under the 161st section of the *Companies Act*, 1862.

Observations on the scope and object of the 161st section.

The Plaintiff, a shareholder in company *A.*, first complained of the proposed arrangement in June, 1865. In September, 1865, notice of the registration of certain shares in company *B.*, under the arrangement, was first sent to the Registrar of Joint Stock Companies. The Plaintiff filed the bill on the 10th of November, 1865:—

Held, that the Plaintiff was not too late in coming to have the arrangement set aside; and that he was competent to sue on behalf of all the other shareholders (though some were assenting), to have a transaction set aside which was *ultrà vires*.

The Plaintiff having made several allegations of fraud, some of which he was held to have established, others to have failed in establishing, and none being, in the event, necessary to have been alleged in order to establish his claim for relief:—

Held, that he was justified in stating, as part of the narrative, the fraudulent transactions which he had proved; and that he was entitled to his costs as to those parts of the suit; but that he must pay the costs occasioned by the charges which had failed.

To a bill charging fraud, Defendants severing and not opposing the Plaintiff's case, are entitled, if the Plaintiff's case succeed, to their costs of separate answers.

Affd by L. C. 4 Ch 121.

THIS was a suit by *William James Clinch*, on behalf of himself and all other the shareholders of the *Financial Corporation*, *Limited*, except the Defendants, against the corporation, the *Oriental Commercial Bank, Limited*, nine directors of the corporation, namely, *James Goodson, Robert Collum, Thomas Cotterell, Richard Davis Heatley, Joseph William Holland, Louis Nathan, George Smith, James Duncan Thomson*, and *Cornelius Walford*, and nine directors of the bank, namely, *James Burney, Edmund Clench, William Redfern Deykin, Demetrio Nicholas Giannocopulo, Edward Temperley Gourley, Angus McKenzie, Miles Charles Seton, Henry Spicer*, and *Edward Gibbon Swann*. The object of the suit was to have it declared that an arrangement which had been come to between the directors of the Corporation and the directors of the Bank for an amalgamation of the two companies, was beyond the power of the corporation directors, and not authorized by the articles of association of the corporation; and that such arrangement was not binding on the Plaintiff, nor on any member of the corporation.

The facts, which were almost wholly undisputed, were as follows:—

The corporation was registered on the 29th of December, 1863, with a capital of £3,000,000, originally in 30,000 shares of £100, afterwards, in July and August, 1864, reduced to 150,000 shares of £20 each; the objects, as stated by the memorandum, being, "the undertaking, assisting, and participating in financial, commercial, and industrial operations and undertakings in *England* and abroad."

By the 58th article of association it was stipulated that the powers therein contained for altering the regulations of the corporation should not extend to authorize any alteration of the regulations providing for the limitation of the liability of shareholders, which was to be deemed a fundamental and unalterable regulation.

By the 92nd article the directors were entitled to receive for their remuneration one-fifth of the net profits, after setting apart a dividend of £5 per cent. on the paid-up capital for the time being.

By the 112th article the directors were empowered, upon such terms as they thought fit, to amalgamate with, or purchase or acquire the business and property of any company carrying on, or formed for the purpose of carrying on, or intending to carry on, any business included among the objects of the corporation.

In September, 1864, the Plaintiff became the purchaser, and was now the registered holder of 2775 corporation shares of £20 each.

On the 30th of December, 1864, the *Oriental Commercial Bank, Limited,* was registered, with a capital of £3,000,000, in 150,000 shares of £20 each, with the objects, as expressed in the memorandum, of taking over and combining the capitals and businesses of two other companies, the *Oriental Commercial Company, Limited,* and the *National Financial Company, Limited;* of carrying on mercantile, exchange, banking, and agency businesses of all kinds, . . . and finally, of doing all such matters and things as might appear to be conducive to these objects, "as well as any further objects which the company may from time to time adopt by special resolution."

By the 98th article the directors were empowered, upon such terms as they might consider beneficial, to amalgamate or combine with, or purchase or acquire the business, property, and connection of any individual, firm, or body corporate, carrying on, or intending to carry on, any mercantile, banking, agency, or other avocation, or possessing a suitable site or opportunities for establishing or carrying on the same.

On the 23rd of January, 1865, the second general meeting of the corporation was held, at which the directors presented a report, which was adopted and confirmed by the meeting. The report shewed a gross profit for about ten months, up to the 31st of December preceding, of £31,836 9*s.* 9*d.*, and a net surplus of £19,128 5*s.* 10*d.*; and recommended a dividend of 10 per cent. for the last half-year, and that £10,000 should be carried to a reserve fund. The auditors, however, appended this note to the balance sheet: "We think it right to observe that a large amount of the transactions on which the profits have been calculated is still pending, and as it is impossible to say what some of the securities held in connection therewith may realize, we are of opinion that the balance of profits exhibited by the accounts should be cautiously dealt with." Immediately afterwards the £10 dividend was paid.

Shortly after this meeting the corporation directors entered into negotiations with the bank directors for the amalgamation of the two companies, and on the 24th of March, 1865, a preliminary agreement was come to between the two sets of directors, called "Outlines of Basis for Combination." This document, which was signed by the Defendant *Swann*, and *Demetrio Pappa*, the manager, on behalf of the bank, and by the Defendants *Heatley* and *Key*, and by the Defendant *Walford*, the managing director, on behalf of the corporation, contained the following material passages:—

"The *Oriental Commercial Bank, Limited*, has a nominal capital of £3,000,000, of which the first issue is proposed to be £1,500,000, in 75,000 shares of £20 each, about £5 paid. The *Financial Corporation, Limited*, has a nominal capital of £3,000,000, of which one-half has been subscribed in 75,000 shares of £20 each—£2 per share paid, or in course of being paid. The paid-up capital of the *Oriental Commercial Bank, Limited*, as proposed in respect of about 45,000 shares issued, or arranged to be issued, is or will be about £245,000, with a reserve fund of about £30,000. The paid and called-up capital of the *Financial Corporation, Limited*, is £150,000, besides a reserve fund and profits carried forward amounting to about £15,000, subject to certain provisions for the regulation of assets of the said corporation, or for the collection of an equivalent amount of further capital by way of call upon the shareholders of the same; so that, in any case, besides the contribution and payment over to the said *Oriental Commercial Bank, Limited*, of a sum or sums equal to £2 upon each of the present 75,000 shares of the *Financial Corporation, Limited* (as above recited), the said *Financial Corporation, Limited*, as at present constituted, shall be bound to pay and discharge (or to indemnify the combined company, if the latter should have to advance for payment of) the whole of the debts and liabilities of the said *Financial Corporation, Limited*. It is now agreed to grant one share in the *Oriental Commercial Bank, Limited*, for every three shares in the said *Financial Corporation, Limited*, so that the present 75,000 shares of the latter shall be replaced, as to all reciprocal rights and obligations, by 25,000 shares in the *Oriental Commercial Bank, Limited*; but, inasmuch as a large proportion of the assets of the said *Financial Corporation* are not yet realized, and further, inasmuch as the proposed combination is considered beneficial in protecting such realization, while it is not in any way intended that the said *Oriental Commercial Bank* should adopt any responsibility, either as to the liquidation of the said corporation, or as to the validity of the proposed combination, in so far as the members of the said *Financial Corporation* are or might be concerned, the following arrangement is now adopted and mutually agreed to between the said combining companies; that is to say:—

"1. That it shall be incumbent on the said *Financial Corporation, Limited*, and on the directors of the same, to render the combination as proposed, and the transposition of capital, transfer of business, exchange of shares, and all other matters incidental thereto, obligatory and binding on all and every the members of the said *Financial Corporation, Limited*, being also *bonâ fide* holders of 75,000 shares as aforesaid therein.

"2. That, in case it may be considered that the assets of the *Financial Corporation, Limited*, be of such character as to admit of a doubt that their realization will provide for the liabilities of the same in due course of maturity, it shall be incumbent on the said *Financial Corporation, Limited*, and upon the directors of the same, to effect arrangements with the holders of bills and obligations payable by the said *Financial Corporation, Limited*, for the retirement of such bills and obligations in exchange for others of more conveniently remote and distributed dates of maturity."

Clause 3 provided for the appointment of liquidators, who were to effect a complete liquidation of the corporation, "in such manner as to satisfy the claims of all creditors and other parties interested, and also specially those of the said *Oriental Commercial Bank, Limited*, arising or to arise out of these conditions of combination, and the entire fulfilment thereof; after which, and not till then, the said *Financial Corporation, Limited*, as now separately constituted, and always excepting the new constitution and interests created by the said combination, shall be legally dissolved.

"4. That a suspense account shall be opened for the purpose of such said liquidation . . . .

"5. That the 25,000 shares of the said *Oriental Commercial Bank, Limited*, granted to the present members of the said *Financial Corporation, Limited*, in exchange for, and extinction of, their actual 75,000 shares as aforesaid, shall, at the date of the said proposed combination, be credited with £4 each, subject to the provisions of clause 7 in case of deficiency in the realization of assets.

"6. That the funds collected in by the said liquidator or liquidators, and passed to the said suspense account, shall be applied, firstly, to meet accruing liabilities of the present *Financial Corporation, Limited,* and then to make up £6 (to be credited as £5), as paid into the capital and premium accounts of the said *Oriental Commercial Bank, Limited,* for every one of the said 25,000 shares; the amount credited, as set forth in the foregoing clause (No. 5), being reckoned as the first instalment of such £6 credited as £5, and the said shares thus participating in the entire combined reserve fund rateably, and that the 25,000 shares shall accordingly, from time to time, and respectively, receive credit for such further payments upon them out of the suspense account as may be effected by the liquidator or liquidators aforesaid pursuant to the provisions of these presents.

"7. That if within a reasonable time, to be mutually agreed upon, the assets of the said *Financial Corporation, Limited,* realized and paid over as aforesaid, shall not have been sufficient to cover the requirements hereinbefore mentioned, it shall be incumbent upon the said liquidator or liquidators to make a special call or calls, to such amount as may be requisite, upon the members of the said *Financial Corporation, Limited,* as at present and heretofore separately constituted, in respect of the uncalled balance on their respective shares therein, and to appropriate the proceeds of such said call or calls in completing the payments to and through the said *Oriental Commercial Bank, Limited,* as hereinbefore mentioned."

The agreement further provided, that, subject to the foregoing conditions and provisions, the bank was to "protect the liquidation" of the corporation, to receive the members in joint incorporation, exchange the shares, adopt the capital, and convert the assets to the common advantage of the combined company, so that none of the liabilities of the corporation should fall upon the proprietary body, otherwise than as thereinbefore provided, and through the liquidators.

This agreement was to take effect from the 4th of April then next.

On the 27th of March, 1865, the directors of the corporation issued to their shareholders a notice headed "*The Financial Corporation, Limited*," informing them that an extraordinary general meeting of the corporation would be held on the 12th of April then next, "for the purpose of carrying into effect the amalgamation" of that company with the bank, pursuant to the terms of a preliminary agreement (the agreement above referred to), and in order thereto, of passing a resolution for winding up the company voluntarily, and taking such other steps as might be requisite.

With the notice the directors enclosed a circular, also headed "*The Financial Corporation, Limited*," and dated the 27th of March, 1865.

The material portions of this document were as follow:—

"The capital of the amalgamated company will be £3,000,000, of which the first issue will be £1,500,000, in 75,000 shares of £20 each, £5 paid. The whole of this first issue is already subscribed. The shareholders of the *Financial Corporation* are to be entitled to one share in the new company for each three shares now held in the corporation, £2 paid; and each of the new shares they will receive in the new company will be credited in the first instance with £4 paid. The remaining £1 is to be credited as the outstanding assets of the *Financial Corporation* are realized; or if these prove insufficient, by a call to the extent of the deficiency, whatever it may be, not exceeding 6*s.* 8*d.* per present share. It is not contemplated to make any calls on the shares of the *Oriental Commercial Bank, Limited*, beyond the £5 per share at present paid. The new company will commence business with a reserve fund of £45,000, being at the rate of 12*s.* per share, in which the holders of *Financial Corporation* shares will participate equally with the other shareholders. A dividend at the rate of 10 per cent. per annum will be paid upon the shares of the *Financial Corporation* from the 31st of December last to the 31st of March instant. *No dividends will be paid, or new shares exchanged for any Financial Corporation shares, upon which any call shall remain unpaid, but all such shares will in due course be forfeited* (1). The *Oriental Commercial Bank, Limited*, will enter into possession of the assets and

(1) In italics in the original.

securities, and take upon itself all the liabilities and engagements of the *Financial Corporation*, immediately on the ratification of the preliminary agreement by a more formal legal deed, which is in course of preparation. This formal deed will be submitted to the proprietors for ratification at an extraordinary general meeting, to be held, pursuant to the enclosed notice, on the 12th of April next; but as various preparatory steps are necessary, the directors are most desirous of ascertaining the views of the shareholders on the proposed arrangement with as little delay as possible. To this end forms of proxy are enclosed herewith, and their immediate return, properly executed, will be considered as an approval of the course the directors have taken to arrest the continued depreciation of the shares of the corporation.

"It will not escape observation that in the arrangement above detailed the liability to future calls is reduced from £18 per share on three £20 shares to £15 (or, pending liquidation, to £16), on one £20 share. All necessary powers for legally liquidating the present company will be provided in the amalgamation deed."

To this circular letter was appended a form of proxy, and a postscript, containing instructions how to sign and return it.

An extraordinary general meeting of the corporation shareholders was accordingly held on the 12th of April, 1865, at which resolutions were passed to the effect that the corporation should be amalgamated with the bank pursuant to the terms of the preliminary agreement of the 24th of March, 1865; and that for enabling the agreement and amalgamation to be carried into effect, the corporation should be wound up voluntarily. These resolutions were confirmed at another general meeting held on the 9th of May, 1865, when it was further resolved that *Thomas Key* and the Defendants *Collum* and *Walford* should be appointed voluntary liquidators.

At the same meeting of the 9th of May, 1865, the draft of a deed purporting (according to the resolution) to carry into effect the said amalgamation pursuant to the said provisional memorandum, "with such variations as have been subsequently agreed to therein," was read and approved. This deed was afterwards executed. It bore date the 17th of May, 1865, and was expressed to be made between the bank of the first part, the corporation of the second part, and the three liquidators, *Collum, Key,* and *Walford,* of the third part. [The view ultimately taken by the Court renders it unnecessary to state the terms of this instrument, further than they are given in His Honour's judgment.]

Early in June, 1865, the Plaintiff expressed his dissent from the amalgamation, and a correspondence followed between his solicitors and those of the corporation as to the terms on which he should be relieved from his liability. This terminated on the 2nd of November, and on the 10th he filed the original bill against the above-named Defendants.

The case made by the Plaintiff was:—First, that the corporation directors, when they presented the report of January, 1865, knew that several of the transactions upon which profits had been calculated had proved unprofitable, and that many were very hazardous, but that still they calculated profits on the assumption that all the transactions would yield the anticipated profit, and they estimated the fees to which they would be entitled (amounting to £4000) on that assumption, knowing it to be unfounded: secondly, that the deed of the 17th of May varied from the agreement for combination and the circular: thirdly, that the circular contained a gross misrepresentation of the true purport of the agreement for combination; particularly in stating that the bank had agreed to assume the liabilities of the corporation; in representing that £1 per share would probably be sufficient to cover such liabilities; and in not stating that the assets of the corporation would become liable to the debts and engagements of the bank: fourthly, that the objects of the bank were different from, and inconsistent with, those of the corporation; and that the corporation had no power to amalgamate by reason of the inconsistency of the articles of the two companies: and, fifthly, that the assent of the meeting to the resolutions was obtained by means of the above misrepresentations.

The Plaintiff said that he abstained from attending the meetings of April and May, 1865, on the faith of the circular, and in ignorance of the objects for which the bank had been established, and accordingly prayed as above stated; and for declarations that the resolutions of April, 1865, were null and void; and for other consequential relief.

Seven of the corporation directors answered jointly on the 27th of March, 1866. They said that the profits of the corporation consisted entirely of commissions and discounts which, according to the usual course of business, were deducted and taken, and were therefore actually received and credited in the books at the dates when the transactions were entered into; and if any loss arose afterwards, it was debited at the date of its occurrence. They maintained that the directors were entitled to calculate their remuneration on this footing. They said that the circular was not a basis of amalgamation, but only a notification to the shareholders of the proposals intended to be discussed; and that its terms were not definitive nor intended to be conclusive. They admitted that the circular, being drawn up whilst the agreement of the 24th of March was still in negotiation, did not express correctly, in all respects, the arrangements ultimately insisted on by the bank; but the circular had been issued before the objections were communicated to the manager of the corporation. They insisted that it was sufficient for its purpose of informing the shareholders of the subject proposed to be discussed, and was not calculated to mislead. They submitted that the Plaintiff was not entitled to assume, without attending the meeting, that the arrangement mentioned in the agreement (or, indeed, any other arrangement, though it might differ from that which he deduced from the circular) would not be the one adopted by the meeting. They insisted that the voluntary winding-up was valid and binding on the Plaintiff, who might have attended the meetings if he had thought fit; also that the arrangements of the deed of the 17th of May were duly and effectually entered into by the liquidators; that the Plaintiff had not, within seven days after the 9th of May, 1865, nor since, expressed his dissent therefrom; that the liquidator and (so far as it was necessary or proper) the directors were entitled and bound to carry out the arrangement; and that the Plaintiff had not established any ground of relief against them.

The bank, and eight of its directors, answering jointly, said that, with reference to the notice of the 27th of March, they inferred therefrom that the meeting was in fact convened by the corporation directors for the purpose of obtaining the shareholders' consent to "the proposed combination with and sale to" the bank. They admitted that a printed copy of the circular was received by them on the 28th of March, 1865. They further said, that from the nature of the arrangements comprised in the agreement and deed, it was a matter of absolute necessity that the bank should make large advances and come under large liabilities to protect the arrangement; that they had done so in good faith, and in reliance on the rights secured to them by the said agreement and deed; and that it was wholly impossible either that the bank or the other parties whose interests had been dealt with could now be reinstated in their original positions, or that the Plaintiff himself could now be so reinstated. They further objected that the Plaintiff had acquiesced, and came too late; also that the suit was defective in not having as parties individually those corporation shareholders who had not taken bank shares.

The Defendant *Swann* answered separately.

The Defendant *Collum*, who answered separately, said that he was an original director of the corporation, but that in October, 1864, the managing director, *Walford*, moved that he should be removed from the finance committee, in consequence of the strictness with which he investigated the securities; and it being suggested that he was nervous, and should resign as another nervous gentleman had done, he accordingly retired from the finance committee, and thenceforward, until he was appointed liquidator, had very little knowledge of the transactions of the corporation. He admitted that there were very material discrepancies between the agreement of the 24th of March and the circular of the 27th; and said he was himself deceived and misled by the circular.

The Defendant *Cotterell*, who also answered separately, admitted that since the institution of the suit he had become aware of very material discrepancies between the two documents, and said he was present at the meeting of the 12th of April, but took no active part in the proceedings.

After these answers had come in, in May, 1866, an order for winding up the corporation compulsorily was made by the Master of the Rolls, and *Lewis Henry Evans* was appointed official liquidator.

On the 3rd of July, 1866, the Plaintiff, having obtained leave, amended the bill by making the voluntary liquidator, *Key*, the official liquidator, *Evans*, and the manager of the bank, *Pappa*, additional Defendants.

The amended bill stated that the Plaintiff had since discovered that the above arrangements for amalgamation were accompanied by a secret agreement between the Defendant *Walford*, the managing director of the corporation, and the bank, or some of its directors, or its manager, that if the amalgamation should be carried out the Defendant *Walford* should be paid a large sum (the bill alleged £15,000) for his services in carrying through the amalgamation.

On the 12th of July, 1866, an extraordinary resolution was come to for the winding up of the bank voluntarily, under supervision; but an order to wind up compulsorily was made in this branch of the Court on the 16th of July. On the 4th of August, 1866, the Lord Chancellor, on appeal, varied the order by directing the voluntary winding-up to be continued under supervision.

Six of the corporation directors, by their answer to the amended bill, in November, 1866, admitted that the words, "or if those proved insufficient, by a call to the extent of the deficiency not exceeding 6*s*. 8*d*. per share," might have produced an inaccurate impression, but they denied the strict meaning of the statement to be that no call or liability would in any event be made or exist beyond 6*s*. 8*d*. They said it was distinctly, and more than once, stated at the meeting that no limit of liability could be stated or guaranteed.

The Defendants *Key* and *Evans* answered separately.

The Defendant *Walford*, by his answer, admitted that on the 9th of March, 1865, a written agreement was come to between him and the Defendant *Pappa* on behalf of the bank, whereby it was agreed that in the event of the amalgamation taking place he was to be paid by the bank, within one month from the ratification of any such agreement, £5000 as compensation for the loss of his office. Of this sum he had received £1500 on account. He said he did not consider the agreement was a secret, though he did not specifically mention it to the shareholders of the corporation.

The Defendants *Collum*, *Cotterell*, and *Swann*, again answered separately; and the bank put in a voluntary answer.

The Defendant *Pappa*, by his answer, said that the circular of the 28th of March was sent to him, not as manager of the bank, but in his private capacity as a shareholder in the corporation: and, except as above, denied that any copy of the circular was sent to any officer of the bank. He further said that the project of amalgamation was suggested to him, as manager of the bank, in the early part of 1865, by Mr. *Thomas Smith*, of *London;* that he entertained the suggestion, and shortly afterwards had interviews with *Walford* on the subject, during which negotiations he (*Pappa*), intending to represent the directors of the bank, promised *Smith*, if the project should succeed, £1000; and *Walford* £5000, by way of compensation for his loss of office. Whilst the negotiations were in progress, but when in particular he could not say, he communicated to the Defendant *Clench* the promise so made to *Smith*, and he believed the Defendants *Clench* and *Spicer* knew of his intention to make the promise to *Walford*, and that he communicated to them the fact of having made the promise immediately after making it, and that they approved thereof.

In the bank directors' answer (filed the 24th of January, 1867) to the amended bill, the Defendants *Clench* and *Spicer* admitted that they knew of this promise to *Walford* at the time it was made; the Defendant *Seton* said he did not hear of it till afterwards; the other five said they never heard of it till after the filing of the amended bill.

They further stated that out of the entire number (75,000) of shares in the corporation, 10,185 were forfeited before the deed of the 17th of May; 39,255 (held by 230 persons) had been registered for exchange for shares in the bank; and the number of shares not forfeited and not registered for exchange was 25,560, held (as it elsewhere appeared) by 114 persons. Notice of registration of some shares in the bank under this arrangement was first sent to the Registrar of Joint Stock Companies on the 9th of September, 1865.

Mr. *W. M. James*, Q.C., and Mr. *A. E. Miller*, for the Plaintiff:—

This attempted amalgamation was beyond the powers of the corporation or its directors. The powers of the corporation, under its articles, were to amalgamate with or to purchase the property of a company with like objects; also to dissolve. It had no power to sell or transfer its business. But the bank was not a company with like objects; their objects were perfectly unlimited. They might embark in any business in the world they pleased: *In re Empire Assurance Corporation, Ex parte Bagshaw* (1). Amongst other differences was this: it was a fundamental and unalterable article of the company's constitution that the liability of the shareholders was not to be altered. But under this arrangement the corporation shareholders were called upon to pay out of their own assets, or by calls, £6, upon which they were to be credited only £5 per share: and were then to share in full with the bank shareholders all the liabilities of the new concern.

The use of the words "combination with and sale to" the bank in the bank directors' answer, shewed that it would be attempted to support the scheme as a sale by liquidators under the 161st section of the *Companies Act*, 1862; a process which can only be effected by a special resolution.

But was this a special resolution at all? The shareholders are informed by circular that a particular arrangement has been come to; they are asked to give proxies to support it; a great number keep away from the meeting on the faith of that representation; and then at the meeting a materially different arrangement is proposed and assented to. We say that nothing inconsistent with the circular can be binding on the shareholders.

Nor was such a sale as this ever contemplated by the *Companies Act*, sects. 131, 133, 161. The duty of a liquidator is to wind up a company, not to enter into contracts which will involve the assets in fresh liabilities. Moreover, these liquidators bind themselves to make calls and raise moneys for the benefit only of such shareholders as chose to come into the arrangement. Upon a sale under the statute the liquidator is bound to see that the selling company is fully paid, either in cash or shares. Here the liquidators were to keep the assets and to pay the debts, and if any surplus remained, to pay £6 for every bank share; if none, to make a call upon the shareholders. Can this be called a sale and purchase?

Nor was this to be actually done by the liquidators themselves. Every shareholder was to act separately for himself. It was an

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(1) Law Rep. 4 Eq. 341.

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exchange, subject to the liability of having to pay up all that was credited on the shares so exchanged, and £20 per cent. more.

Nor did the deed carry out the terms of the agreement. [This part of the argument becomes unnecessary.]

Had both these companies been making large profits, the case would have been different; but here one was insolvent, and its shareholders are called upon at once to make up its deficiencies, and then to buy the shares of another company.

Apart from the above grounds, the amalgamation was preceded by a double fraud. *Pappa*, the bank manager, offered a bribe to *Walford*, the managing director of the corporation. To earn this bribe it became necessary to effect the amalgamation, which was brought about by a resolution at a meeting summoned after issue of a circular containing a gross misrepresentation. It may be true that the circular was drawn up whilst the agreement of the 24th of March was in negotiation; but not having been issued till the 27th, it was not the less a fraud. The directors were bound to have corrected it: *Henderson* v. *Lacon* (1); *Beck* v. *Kantorowicz* (2); *Atwool* v. *Merryweather* (3).

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(1) Law Rep. 5 Eq. 249.

(2) 3 K. & J. 230.

(3) V.-C. W. 1867, June 7, 10.
(2 W.R. 192) 37 L.J. Ch. 35.

ATWOOL *v.* MERRYWEATHER.

L.R. 7 Eq. 328 —9
8 Eq. 557. —561
8 Ch. 1049 1051.
9 Ch. 352-3
6 Eq. 391-3
0 Ch. 667
0 Eq. 477, 482
Ch. D. 19, 20,
6 Ch. D. 74. — 630
11 Ch. D. 103-4, -6, -7, -9,
12 Ch. D. 720, -4

THIS was a bill by the Plaintiff, on behalf of himself and all other the shareholders in the *East Pant Du United Lead Mining Company, Limited*, except the persons who were Defendants thereto, against *Samuel Merryweather*, *Henry Whitworth*, and the *East Pant Du Company, Limited*, for the purpose of setting aside a contract for the sale and purchase of certain mines (for the purpose of purchasing and working which the company was formed), and compelling repayment from *Merryweather* and *Whitworth* of the sum of £3940, or such portions as had been received by them, and a return of the 600 shares allotted to *Merryweather*.

The bill stated the incorporation, in 1863, of the company under the promotion of Defendants *Merryweather* and *Whitworth*, who published a prospectus stating that the company was formed "for the purpose of purchasing and working the extensive and valuable mining sets known as the *East Pant Du* and *Colomendy Lead Mines*," and containing very favourable representations of the value of the mines, for the purchase of which the company was stated to have arranged for £7000—£4000 to be paid in cash, and £3000 in shares of the company.

The capital was fixed at £30,000, divided into 6000 shares of £5 each; but only 2000 shares had been taken altogether, on which £3940 had been received. This money was paid to *Merryweather*, and 600 shares were registered in his name as paid up, in part payment of the £7000, the alleged price of the mines.

Upon inquiries, the following cir-

It is open to the Defendants *Collum* and *Cotterell* to sever in defence on the authority of the last case.

As to the frame of the suit, it cannot be maintained that the

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cumstances were discovered in reference to the formation of the company: *Merryweather* applied to *Whitworth* to assist him in disposing of the mines in question, which he held under an agreement for a lease for twenty-one years, and had then discovered to be of no value. *Merryweather* proposed to dispose of his interest for £4000, and the scheme concocted between himself and *Whitworth* was, that a company should be formed for the purpose of purchasing and working the mines, which were to be sold to such company for £7000.

Of this money *Merryweather* was to get £4000, while the remaining £3000 was to be paid to *Whitworth* for his assistance in getting up the company. This agreement was concealed from the other directors, who were induced to believe that £7000 was *bonâ fide* to be paid as the purchase-money.

A committee appointed at a meeting of the 1st of June, 1864, recommended by their report that the undertaking should be abandoned, steps taken to relieve the company from any liability on the contract, and to recover back the money already paid by the shareholders.

At an extraordinary general meeting held on the 16th of June, 1864, a resolution was passed for receiving the report by a majority of the shareholders, and on the 30th of June, 1864, a bill was filed in the name of the company, alleging that the contract for the purchase of the mine had been fraudulently obtained by the Defendant *Merryweather*, and was void, and that he was not entitled to the 600 shares allotted to him in respect of it, and praying that the purchase of the mine might be set aside, and the money paid returned to the shareholders who had advanced it.

On the 6th of July *Merryweather* and *Whitworth* caused notices to be issued for a meeting of the board of directors "to consider the course to be taken in reference to the Chancery proceedings which have been instituted in the name of the company." At the meeting held on the 9th of July *Merryweather*, *Whitworth*, and *Ashworth* (the three out of the six directors present at the meeting) passed a resolution that proceedings should be taken to get the bill taken off the file.

On the 1st of August, 1864, the Court was moved to take the bill off the file, but the motion was ordered to stand over until the next term in order to give an opportunity to call a general meeting of the shareholders of the company to take the matter into consideration. A meeting was accordingly held on the 12th of October, "for the purpose of taking the said bill into consideration, and adopting such resolutions in reference thereto as the meeting may determine upon."

A resolution was proposed for adopting and continuing the Chancery proceedings, whereupon an amendment was proposed by *Whitworth* for referring all matters in difference between the shareholders and *Merryweather* to arbitration, and for staying all legal proceedings. This amendment was lost by 11 votes to 4 upon a show of hands, and the original resolution was carried by 10 to 4. A poll having been demanded upon the amendment, proxies were produced, and 14 persons, holding altogether 1070 shares and 324 votes, voted

(1). See 10 Jur. N.S. 1231.

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application should have been made in the winding-up; there is no jurisdiction under a winding-up order to try such a question as this.

Any objection that the bill should have been filed by the com-

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against the amendment, and 12 persons, holding 1490 shares and having 344 votes, voted for the amendment. But excluding the votes of the Defendants *Merryweather* and *Whitworth*, there was a majority of 86 votes against the amendment, and excluding only the votes of *Merryweather* there was a majority against it of 58 votes." The motion to take the bill off the file was renewed, and on the 5th of December, 1864, the Vice-Chancellor Sir *W. P. Wood* directed the bill to be taken off the file, but made no order as to the costs of the motion. (See 2 H. & M. 254.)(1)

The present bill, which was filed on the 14th of December, 1864, by a holder of 100 shares in the company (purchased on the faith of the statements contained in the prospectus), suing on behalf of himself and all other the shareholders in the *East Pant Du Company*, except the Defendants, against *Merryweather*, *Whitworth*, and the company as Defendants, alleged that none of the shareholders in the company other than the Defendants were desirous that the contract with *Merryweather* should be carried into effect, or that the relief prayed should not be granted; that the Defendants had altogether 106 votes as shareholders in the company, and obtained the proxies of the other shareholders who voted for the amendment by entering into engagements to indemnify them against loss; "and such votes, together with the aforesaid 106 votes of the said Defendants, constitute a majority of the shareholders' votes in the company."

The bill also alleged, that even without such proxies the 106 votes held by the Defendants made it impossible to obtain a fair decision at a general meeting.

The bill further charged, that the contract was obtained by misrepresentations as to the value, with full knowledge by the Defendants that the mines were worthless, that £4000 was an exorbitant price for them, and that no other portion of the £7000 was ever intended to be treated as purchase-money of the mines, but was intended to be paid to *Whitworth*, the Defendants having become promoters of the company solely for the purpose of raising the £7000 for their own private benefit; that these facts were fraudulently concealed from the other directors and shareholders, and that if they had been disclosed the company never would have contracted to purchase the mines. The bill prayed that the contract for the purchase of the mine might be set aside, and a return of the money and shares received by *Whitworth* and *Merryweather*; and an injunction to restrain any proceeding to recover the balance of the purchase-money; compensation for all damage and loss occasioned to the company, and, if necessary, that the company might be dissolved and wound up under the direction of the Court.

Mr. *Kay*, Q.C., and Mr. *Fry*, for the Plaintiff:—

A sufficient case of fraud, collusion, and suppression has been shewn to enable the Court to set aside the contract, and it is competent for an individual shareholder to maintain a suit for setting aside the contract, even if such suit were opposed by a majority of the shareholders. But that is not the case

(1) S.C. 10 Jur. N.S. 1231

pany itself, is answered by the case of *Maunsell* v. *Midland Great Western (Ireland) Railway Company* (1).

Sir *Roundell Palmer*, Q.C., Mr. *Druce*, Q.C., and Mr. *Macnaghten*,

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here, as, by excluding the votes of *Merryweather*, there is a majority in favour of setting aside the purchase and winding up the company: *Bromley* v. *Smith* (1 Sim. 8); *Preston* v. *Grand Collier Dock Company* (11 Sim. 327); *Hichens* v. *Congreve* (4 Russ. 562); *Beck* v. *Kantorowicz* (3 K. & J. 230); *Lovell* v. *Hicks* (2 Y. & C. Ex. 46, 481).

Mr. *Druce*, Q.C., and Mr. *A. E. Miller*, for *Merryweather's* assignee:—

Upon the frame of the suit, the contract is not void, but merely voidable, and the majority of the shareholders may confirm it, and bind the whole body for that purpose. The suit, therefore, in its present form, is improperly framed: *Foss* v. *Harbottle* (2 Hare, 461, 494); and the proper course would have been for the Plaintiff to have filed a bill for leave to use the name of the company against the parties to the contract. Assuming the price paid for the mine to have been excessive, the Plaintiff may have a case for making the directors account, but that affords him no *locus standi* as against the vendors for setting aside the contract: *Pulsford* v. *Richards* (17 Beav. 87)(1) *Fraser* v. *Whalley* (2 H. & M. 10).

Mr. *Horsey*, for *Whitworth's* assignee.

Mr. *Charles Hall*, for the company.

Sir W. Page Wood, V.C.:—

I think that, upon principle, a contract of this kind cannot stand, and that there is not such a defect in the constitution of the suit as would be fatal according to the authority of *Foss* v. *Harbottle* (2 Hare, 461).

Looking at the facts as they come out, I am clearly of opinion that this arrangement, by which *Merryweather* was to have £4000 and *Whitworth* £3000, was concealed from everybody, and that *Merryweather* assisted in that concealment by allowing his name to appear as the sole vendor, and taking the purchase-money.

Upon such a transaction the Court will hold that the whole contract is a complete fraud. I do not in the least say that where persons with their eyes open know that the agent who secures them the bargain is going to take money for it, that would not be all right enough. If the company knew this gentleman was to have this amount as promotion-money, well and good. There might have been some difficulty, Mr. *Whitworth* being a director, if it had been a sale by *Merryweather* and *Whitworth eo nomine*, both of them together. If that had been the case more might have been said about the frame of the suit. But here it is a simple fraud, and nothing else. *Merryweather* knowing *Whitworth's* position with regard to the company, and that as an honest man *Whitworth* was bound to tell the company what price he bought the mines for, agreed that the mine should be sold to the company for £7000, and that the real price, £4000, should not be disclosed to the company.

With regard to the frame of the suit, a question of some nicety arises how far such relief can be given at the instance for the Defendants, the bank and its directors (including *Swann*), and its manager, *Pappa* :—

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(1) 1 H. & M. 130. 9 Jur N.S. 660

(1) SC 17 Jur 845.

This transaction has been completed, and is irreversible.

The Plaintiff, being one of the 114 persons who have not taken advantage of the arrangement, though not alleging that he has been

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of a shareholder on behalf of himself and other shareholders on the ground that the transaction might be confirmed by the whole body if they thought fit, and that the case would fall within *Foss* v. *Harbottle*, according to which the suit must be by the whole company. On the previous occasion, when it was desired to take proceedings to set aside this transaction, a gentleman took upon himself to file a bill in the name of the company. A motion was made to take that bill off the file, as the person filing the bill was not the solicitor of the company, and was not authorized to file the bill, and I ordered the bill to be taken off the file. There was a majority against setting aside this transaction. The number of votes for rescinding the transaction was 324, and 344 the other way. But *Merryweather*, in respect of the shares obtained by this sale, which I have held cannot stand, had 78 votes, and *Whitworth* 28, making altogether 106 out of the 344. If I were to hold that no bill could be filed by shareholders to get rid of the transaction on the ground of the doctrine of *Foss* v. *Harbottle*, it would be simply impossible to set aside a fraud committed by a director under such circumstances, as the director obtaining so many shares by fraud would always be able to outvote everybody else. I held on a former occasion, and I adhere to that decision, that the Court must first be satisfied that the Plaintiffs were authorized to call themselves the company, the solicitor who put the bill upon the file having no retainer under the corporate seal.

This bill being filed by the Plaintiff on behalf of himself and the other shareholders, it is suggested that the proper course would be to file a bill on behalf of himself and the other shareholders for leave to use the name of the company, in order to set aside that contract. I do not think that circuitous course is necessary under any circumstances. It is quite clear that it is not necessary here, because in this case the purchase of the mines is the only thing for which this company was incorporated. It appears to me that it would not be competent for a majority of the shareholders against a minority to say that they insist upon a matter of that kind where the whole inception of the company is simply a motion by a fraudulent agent, *quà* director, to confirm a purchase as made for £7000, which was made for £4000. The whole thing was obtained by fraud, and the persons who may possibly form a majority of the shareholders, could not in any way sanction a transaction of that kind.

I think in this particular case it is hardly necessary to rely upon that, because, having it plainly before me that I have a majority of the shareholders, independent of those implicated in the fraud, supporting the bill, it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company, and *pro formâ* have a totally different litigation. The only course now to take is to set aside the contract for sale and purchase of the mines, and cancel the agreement for such sale. The purchase-money

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damnified in any way, takes upon himself to represent not only the 114 dissentients, but the other 230 also. That is totally impossible: *Richardson* v. *Larpent* (1); *Carlisle* v. *South-Eastern Railway Company* (2).

It has been argued that the liquidators may make calls upon the Plaintiff if he does not come into the arrangement. We deny that that is the effect of the agreement. The agreement is that the whole assets of the corporation are to be kept separate until all the liabilities are discharged. Only in case of their being in excess are they to be transferred to the bank. The Plaintiff, according to his own shewing, remains subject only to the liabilities of his old company; he is under no fresh liabilities.

Moreover, the Court has to consider the rights of those who have come in on the faith of this agreement. It is impossible now to reinstate the parties; hence the contract cannot be rescinded; the Plaintiff's remedy is by action of deceit: *Clarke* v. *Dickson* (3); *Mixer's Case* (4); *Western Bank of Scotland* v. *Addie* (5).

The *Era Company's Case* (6) governs the present. The Plaintiff, having made no application from April to November, must be held to have acquiesced: *Lawrence's Case* (7).

Then upon what principle is the bank responsible for the alleged arrangements between *Walford* and *Pappa*, to which Messrs. *Clench* and *Spicer* say they were privy? It was not made by anyone competent or intending to bind the bank; there is nothing to shew that *Pappa* ever acted otherwise than in his individual capacity: *Gibson's Case* (8); *Holt's Case* (9). In *Bell's Case* (10) the act of the secretary was clearly done by the authority of the directors.

The bank were not affected by constructive notice of the circular

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must be repaid with interest, and the share certificates given to *Merryweather*, delivered up. The profits made by the company to be set off, and the company to have a lien for the balance. I shall also declare that the company ought to be wound up.

Solicitors: Mr. *P. H. Lawrence*; Messrs. *Rooks, Kenrick, & Crook.*

(1) 2 Y. & C. Ch. 507, 514.

(2) 1 Mac. & G. 689.

(3) E. B. & E. 148. 4 Jur NS 832.

(4) 4 De G. & J. 575, 586.

(5) Law Rep. 1 H. L. Sc. 145.

(6) 2 J. & H. 408; S. C. on app. 1 D. J. & S. 29, 35.

(7) Law Rep. 2 Ch. 412.

(8) 2 De G. & J. 275.

(9) 22 Beav. 48.

(10) Ibid. 35. 2 Jur NS 844

which was sent to *Pappa: Duncan* v. *Chamberlayne* (1) has been overruled by *Thompson* v. *Speirs* (2). A person who is not consulted is not bound: *Henessey's Executors' Case* (3).

We further say there was no discrepancy between the "outlines" and the deed.

No doubt a man is not compellable to go into a new company; but he must not acquiesce.

Further, this was a valid purchase and sale within the 161st section of the Act.

Mr. *Kay*, Q.C., and Mr. *Eddis*, for the corporation and the Defendant *Evans*:—

The corporation, having a separate suit to set aside this amalgamation, take no part in this argument.

Mr. *Evans*, the official liquidator, has been unnecessarily made a party.

Mr. *G. M. Giffard*, Q.C., and Mr. *Haddan*, for the Defendants *Goodson*, *Heatley*, *Holland*, *Nathan*, *Thomson*, and *Key*:—

All that is prayed against us is costs. Upon this record the Plaintiff can have no relief against these Defendants personally. He does not say he has sustained any loss through these Defendants, or any of them.

The first charge of fraud in the bill, that, namely, of keeping improper accounts, has been abandoned.

As to the circular, we admit that these Defendants were in the habit of trusting their managing director, *Walford*, with these matters.

At the meetings no proxies were used; the agreement was read, and the deed was read. The Plaintiff does not allege he voted, or took any act in consequence of being deceived.

If the arrangement was *intrà vires*, the charges of fraud fall to the ground. The company is under liquidation, and the principles of *Oakes* v. *Turquand* (4) and *Foss* v. *Harbottle* (5) apply.

It has been suggested that the funds of the corporation will not be sufficient to cover its liabilities. But there is no allegation against these Defendants of any waste of assets, or of the loss of a sixpence. Nor is the Plaintiff seeking to restrain a call for anything beyond the debts of the corporation.

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(1) 11 Sim. 123.
(2) 13 Ibid. 469.
(3) 3 De G. & Sm. 191; S. C. on app. 2 Mac. & G. 201.
(4) Law Rep. 2 H. L. 325.
(5) 2 Hare, 461.

If the Plaintiff is afraid that a claim may be made against his company, that is a question for the corporation.

Mr. *Kay*, Q.C., and Mr. *C. T. Simpson*, for the Defendants *Collum* and *Cotterell* :—

The Plaintiff must pay the costs of the paragraphs relating to the improper accounts, and of other irrelevant matter.

The present Defendants in other respects do not oppose the Plaintiff's case.

Mr. *Pearson*, Q.C., and Mr. *Marten*, for the Defendant *George Smith* :—

No relief can be had against this Defendant, he not having been present at any of the general meetings, and not having been a member of the amalgamation committee.

Mr. *Fischer*, for the Defendant *Walford* :—

The proposed remuneration was not excessive for the loss of the office of managing director, and would probably have been acceded to. It was, no doubt, an error of judgment to keep the transaction a secret.

Mr. *James* was called upon to reply on the questions of *Walford's* fraud and of time only :—

Walford was bound to state all the circumstances.

Time never applies to the case of a void contract, as we say this was; nor was the lapse of time from May till the 10th of November unreasonable, considering the fraud of the circular.

Feb. 28. SIR W. PAGE WOOD, V.C. :—

The first question that I have to determine is, whether, regard being had to the position of these two companies, the arrangement that was come to between them is valid; then, in the event of my holding that the arrangement is not valid, I have to consider how far the Plaintiff is precluded from suing on the ground of delay.

As regards the arrangement, it appears to me quite clear that the scheme cannot be supported on any ground of its being an amalgamation within the original scope of the articles of association. That, indeed, was scarcely contended for, and the attempt to support it has been mainly rested upon the 161st section of the *Companies Act*, 1862.

In the articles of association of the *Financial Corporation* there was undoubtedly a power to amalgamate with other companies having the same objects. But, in the first place, the objects of the association called the *Oriental Bank* (which I shall designate as the bank), were far more extensive, and embraced every mercantile pursuit that can be imagined. Another objection—apparently smaller, but still not otherwise than conclusive on such a subject as this—is, that by this scheme the corporation shareholders were to be introduced into the bank only after having paid £6 on shares for which they would be credited as having paid only £5; and thus they would enter the bank with an overload of £1 per share, and would still be liable in full with the rest for the debts of the new concern. But by the articles of the corporation, it was declared to be a fundamental and unalterable regulation that the amount of liability of the shareholders should not be varied. So that the excess of £1 per share was a matter which could not be stipulated for as a term of an agreement which would bind the shareholders in the corporation.

Looking, therefore, either to the scope of one company as compared with that of the other, or to the excess of liability which would be created on amalgamation, I think it impossible to maintain this arrangement on the footing of the articles of association of the corporation.

11 Eq 69/73, The question then comes to this—whether this was an arrangement which can be supported under the 161st section of the *Companies Act*, 1862

6 Eq 97 Now it is clear that the 161st section points to this: that if a company be desirous of merging themselves in another company, inasmuch as a minority of dissentient shareholders cannot be com-

pelled to take shares in the other company, it may be desirable that the first company shall have a power of closing its concerns and winding up its affairs, and upon so doing of selling its assets to the other company, which may be disposed to purchase those assets, paying for them in shares. Then it would be for the shareholders in the company which was being wound up to say whether they will take shares or not. If they refuse to take shares, they lose all interest in the purchase-money: they are so far bound by the resolution of their own company as to lose all right of claiming any portion of it; but the sale may still be a good sale of the concern by one company to the other.

What then I have to try in this arrangement is—whether the present can in any way be considered a transaction of that sort.

Now it appears to me very clearly from the two instruments, taken together, that the preliminary agreement was really the foundation of all that was done. If there be any important difference between the deed of the 17th of May and the agreement, the agreement is undoubtedly that upon which the vote of the company was originally taken, and upon which the whole matter must stand. If I were to find any difference between the deed and the agreement, I should simply pass that difference by, and treat the whole transaction as standing on the agreement.

Now I will avoid for the present all questions about fraud and misguidance on the part of the corporation directors, and look at the arrangement as a thing intended to be carried into effect *bonâ fide*, if it possibly could be. On the face of the original agreement, the "Outlines of Combination," as it was called, it is quite clear that persons instructed in the consideration of matters of law were consulted, and it is evident that the difficulty I have now to consider struck them, for the whole purport and scope of it bear manifest marks of hesitation as to its legality.

[His Honour here read the principal provisions of the "Outlines of Combination," and continued :—]

What strikes me as the plain intent and meaning of the whole scheme, as proved to have been the intent of the parties, and as confirmed by the subsequent dealings which took place, is this :— The corporation and its shareholders were to be bound to pay £6

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on 25,000 shares of the bank, *i.e.*, £150,000; or, in other words, they were to be forced to buy 25,000 bank shares at this particular price. It was not a handing over of the assets of the corporation to the new company, as a result of the purchase of those assets by the new company in consideration of shares in the new company, which is what I take to be the meaning of the 161st section; it was something far beyond that. It was a provision that the corporation should be bound to buy these shares with its assets, if sufficient—or by means of calls on its shareholders if insufficient; and the corporation was not to be dissolved until, by one means or the other, the contract to pay £150,000 had been fulfilled.

If that be the true construction of the agreement, it is quite clear that it is an arrangement not within the 161st section. Nothing in that section justifies the compelling of the company under dissolution to become the purchasers of shares which many of the shareholders may not be desirous of taking, which they are not compellable to take, and with calls upon which they may have nothing to do, if they do not choose to take them; in other words, to create a debt of £150,000 from the corporation to the bank.

The only way in which the scheme could be justified was that in which the case was put by Sir *R. Palmer*. He said it was only an option of purchase of so many shares to persons who chose to take them. The bank held 25,000 shares at the disposal of the corporation, to be allotted to them. There the whole thing was to end.

If that really had been the scheme, it might have been a legitimate one. But upon reading through the rest of the agreement it will be found impossible to suppose that that could have been the arrangement. The outset of the agreement was this—that the bank wanted additional capital. They said to the subscribers, "We will give you credit for what you have paid up to a certain extent; but you shall not have the full credit; when you have paid £6 per share you shall only have credit for £5; or, in other words, your shares must be considered as fallen to £1 discount. The rest you must make up, and you must bring in to us a sufficient capital to go on with the arrangement we proposed to you."

[His Honour then went through the "Outlines of Combination," observing that the phrase "protecting the liquidation," meant that the bank would make advances, as they did, in assisting in the realization; and noticing the words, "as to the validity of the proposed combination," as being one of the hints of doubt as to the validity of the transaction. The object of the first article was plainly this:—that the corporation should be under a valid and legal obligation to the bank that, to the extent of the *bonâ fide* holders of 75,000 shares, they should be brought into the arrangement and be subject to all its liabilities; that if so, the agreement should be good, if not, it should not be good. The second article did not appear to be very material. The third was inserted, no doubt, with a view to the 161st section. It was to be one of the duties of the liquidators to get in money to satisfy all claims arising out of the conditions of combination, one of which was, that the corporation shareholders were to take 25,000 shares at the price fixed; and further, it was not until all such claims were satisfied that the corporation was to be dissolved, for the very obvious reason that it might be found necessary to have recourse to a call. The seventh article contained the real substance of the whole case. It was this: there was to be a suspense account; the corporation shareholders were to be credited with £4 per share; if the £4 were not actually paid, it was to be taken in the shape of assets: and then out of the self-same assets, if they should suffice, £2 per share more was to be taken, and when £6 had thus been taken, £5 only was to be credited. But if, within a limited time (which by the subsequent deed was fixed at a year), the whole amount was not raised, then there was to be a call to the extent of making good the whole amount of the shares agreed to be bought, namely, 25,000 shares at £6 per share, or £150,000. His Honour continued:—]

It appears to me plain that this is a contract that the corporation are to be bound to bring in £2 per share upon their 75,000 shares, and not only that, but the corporation, as distinguished from the shareholders individually, make themselves liable to see to the legality of the whole arrangement—to see that there shall be holders of 75,000 shares acquiescing in the arrangement—and that those 75,000 shares are to be brought forward, at whatever hazard, if this agreement is to take effect. The arrangement was to create a debt against the corporation for this amount, and so the bank

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have dealt with it. They have brought in a claim for £150,000 against the corporation, founded upon this document, because, as they say, the corporation have agreed to take this number of our shares, and to make calls for it.

I say that such a claim as that appears to me wholly beyond the 161st section, or anything contained in it. There is nothing in that section which authorizes a contract binding dissentient shareholders to make good, by way of call, the sums of money which may be necessary to make up a call of £2 a share—in other words, to buy the shares of another company with anything but the assets of the company. Such assets are the assets at the time of liquidation, not assets to be got by subsequent calls, in order to make good an arrangement of this kind, and to force the reluctant shareholders into paying £2 a share; which will be a payment not for their benefit, if they do not choose to take shares, and if not for their benefit, then for the benefit of those who do take shares. That would be an act of the most preposterous character—it would give a majority of the shareholders the power of binding the minority, not only to take shares in another concern, but to submit to calls being made upon them for the purpose of raising the sum which was to be so advanced.

Then there was a meeting purporting to be held by the company upon notice (which I will assume was quite regular in its form), calling upon the shareholders to pass a resolution that they would adopt this agreement; and so far as the company had any power to pass and confirm this resolution, it was done, subject to the questions which have been raised as to fraud.

Afterwards a deed was executed, dated the 17th of May, the provisions of which I do not think it necessary to go through. The whole scheme of it was in truth the same substantially as that of the agreement; and the only point I think it necessary to notice is, that the time, which was previously left indefinite, was by this deed agreed to be left to be fixed afterwards. I take it that the shareholders, before they confirmed this agreement, authorized the directors, so far as they could authorize them, to settle this question of the time. At a subsequent meeting the time was extended to a year.

At a meeting held on the 9th of May, the parties, so far as they were able, confirmed the draft of this deed; but did so in a form which, if they had been legally advised, they would have found was not very convenient, and not the best in which it could have been done. The form was, "with such variations as have been referred to." Had the variations been important, the confirmation at the meeting would not have been a valid confirmation; but I do not think the variations to have been of any serious importance; for, in my view of the case, they give exactly that construction to the "Outlines of Combination" which I have already stated; and the stipulations are, generally, of the same character as the obligations of the preliminary agreement.

That being so, it appears to me that this Plaintiff would have been justified, soon after the arrangement had been made, in filing a bill to set aside all that had been done. The arrangement having been made in May, and sanctioned in the same month by the shareholders at the subsequent meeting, the Plaintiff says he was not aware of there being anything erroneous in what had been done until June. In that month he became aware of it, and the bill was not filed till the 10th of November.

Now, I have been extremely anxious to collect from the cases which have occurred of late, where delay has taken place, and there cannot be a *restitutio in integrum*, what is to be done, and whether the Plaintiff can be allowed to complain if he does not immediately file his bill.

In this instance, after considering the whole case, and the evidence which by consent has been produced at the hearing, including that of the liquidators, I find the state of facts to be this:—It does not appear that anything serious was done as to the combination of these two companies until the 9th of September. What then happened was this: shares in the corporation were sent in to the liquidator of the corporation by a number of the corporation shareholders, and certificates were given by the liquidator to each shareholder for the corresponding number of shares he was to hold in the bank; that number being one share in the bank for every three in the corporation. Of these shareholders a register was kept by the bank, down to the 9th of September; at which date, and not before, a copy of such register was sent to the Registrar of Joint Stock Companies. Then, it further appears that, in pursuance of this arrangement, the bank made large advances in order to help the corporation to meet existing liabilities. It was part of the arrangement (at least so I hold, from the conduct of all parties, including the Plaintiff) that the assets of the corporation should belong to the bank. It turned out that these assets, though considerable in amount and value, were not suitable investments for the bank to hold. It is at all times imprudent for a bank to hold investments which cannot readily be realized. These investments were divided into three classes, A, B, and C. Class A were thought to be the most available, and these the bank were willing to take over at once; Classes B and C were transferred to suspense accounts, and these were to be got in gradually, according to the operation defined in the "Outlines of Combination," and, after satisfying the liabilities of the corporation, were to be carried to the credit of the share accounts. With regard to Class A, the bank was to give credit for them in account at once; if the amount realized should exceed the amount they advanced, it would be all the better for the corporation shareholders. The sum advanced by the bank to the credit of Class A was £80,000. But that transaction I do not consider to be in any sense irretrievable. No Court would, of course, set aside this transaction without holding that these investments must stand as securities for the sums actually advanced; but that part of the arrangement could easily be set straight, as a matter of account.

On the 9th of September, then, it appears that notice was sent of these shares having been registered. Now I have not got creditors present, and for aught I know liabilities may have been incurred by the persons whose names were so registered. But after the 9th of September nothing more was done. The liquidator who received the shares of these persons still holds them (with one insignificant exception), and they have not been since parted with or dealt with by the holders. Whether those persons may have made themselves liable or not for any obligation of the bank, of course, is not a question for the bank. They are none the worse for other persons having come in and shared their obligations. But it does not appear to me that the Plaintiff came too late on the 10th of November to be relieved from any such obligations, when nothing had been done beyond the registration of these shares (of which notice was given on the 9th of September), and the payment of this sum of £80,000.

The Plaintiff, of course, cannot be affected by anything which has been done since the 10th of November, 1865.

I ought, perhaps, to notice the argument that has been adduced —that the Plaintiff is not competent to represent the other shareholders—although it is scarcely necessary to say a word upon it. The authorities have now completely settled that, whatever may be the position of the shareholders, every shareholder is supposed to have a common interest with the Plaintiff in varying any arrangement that may have been entered into *ultrà vires*. On that part of the case I have no difficulty.

The Plaintiff is, therefore, in my opinion, entitled to a declaration "that the arrangement come to between the directors of the corporation and the directors of the bank for an amalgamation of the two companies was beyond the powers of the directors of the corporation, and was not authorized by their articles of association." Then to a declaration "that the resolutions were not within the powers of a general or any other meeting of the corporation, and were not authorized by the memorandum or articles of association of the corporation, or by the *Companies Act*, 1862, and that the same are not binding on the Plaintiff or any other dissentient member of the corporation." Then to the relief which he asks, "that the corporation and the directors, and official liquidator thereof, and the bank, and the directors thereof, may respectively be restrained by injunction from carrying the proposed amalgamation into effect; and that the directors of the corporation may, in like manner, be restrained from parting with or handing over to the directors of the bank the assets of the corporation, or any part thereof, now in their hands, in pursuance of the arrangement, or of any other arrangement or agreement to the same or any similar effect."

There must then be a declaration, "that the bank are entitled to stand as creditors of the corporation in respect of any advances or payments which they have made in liquidation of any of the debts or liabilities of the corporation, and to a lien upon all the assets of the corporation comprehended in schedules A, B, and C, to the deed, to the amount of such advances, with interest upon such as bear interest at the rate reserved;" and an order "that the bank be at liberty to go in under the order under which the corporation is ordered to be wound up, to establish any claim it may have against such assets of the corporation as aforesaid under the above declaration."

Then there must be another declaration, "that, without prejudice to any question as between the shareholders of the corporation who are registered as shareholders of the bank, and the creditors of the bank, such shareholders are, as between themselves and the bank on the one hand, and as between themselves and the corporation on the other, entitled to have their shares in the corporation returned to them on the delivery up of the certificates of their shares as registered in the books of the bank; and that the Defendant *Evans*, as liquidator of the corporation, is bound to restore such certificates to the liquidator of the bank accordingly; any of the parties to be at liberty to apply in the respective windings up of the bank and of the corporation in respect of such last-mentioned declaration." That disposes of everything in the suit except costs.

As regards the question of costs, there are a great number of Defendants, and there is some difference in the position of several of them. First, as to the main body of the corporation directors, Messrs. *Goodson*, *Heatley*, and the rest, they in their answer distinctly assert, as the bank in their answer also assert, that the engagement is valid; although, it is true, the corporation now take a different view of the transaction. [His Honour referred to the answer of the corporation directors to the original bill, observing that it raised the questions of acquiescence within the 161st section of the Act, and of laches, and continued:—]

It appears to me that those who insisted upon the agreement being good, having failed to the extent to which it has been declared invalid, must be liable to costs. That will apply to the bank and its directors, who were the parties who persisted in going on with the arrangement after the filing of the bill, and to the corporation directors.

Now, there were several charges of fraud in the bill, and they are easily distinguishable. It has been alleged, and to a great extent proved (though perhaps it was unnecessary to allege it, the proceeding being *ultrà vires*), that a circular was sent along with the notice convening the meeting which was to confirm, and which did confirm, the resolution, telling the shareholders that an agreement had been entered into of a very different character from that which was actually entered into. A copy of that circular was also sent to the bank; and it is curious that, whilst there appears some hesitation in admitting that it was served upon the manager of the bank in his official capacity, the letter of the manager pointing out the discrepancies between the circular and the agreement is entered on the minutes of the bank. So that the bank had notice of the discrepancies; but yet, strange to say, the directors did not interfere or take any step, but allowed the meeting to be held on the faith of a circular which must be held to have been distinctly fraudulent, for there could have been no motive in making such a representation, except to engage votes, which might otherwise have been withheld; and along with it proxy papers were also sent. The only excuse is, that when the meeting was held the real transaction was stated, and that some persons who were sharp enough to see the difference were nevertheless induced to acquiesce. It is said there were no proxies used; but how is it possible for the Court to know how many shareholders abstained from attending the meeting, being satisfied that the arrangement, as it was proposed, was advantageous to them, and being quite content to exercise no voice about it? Such a circular is worse than a notice that does not state what the meeting is to be for, because it states untruly what it is to be for, and thus obtains acquiescence in something entirely different from what was actually carried. This proceeding, therefore, was clearly fraudulent.

The next transaction is a very painful one, though happily confined to individuals, and not to be fixed upon the company. The managing director of the corporation receives a bribe of £5000 to assist in carrying this arrangement out. Everything that could be said for him was said by Mr. *Fischer*, his counsel; and if the arrangement had been above board, I am not sure that it was not one which the bank might have been justified in making; or that it was unreasonable. The managing director of the corporation with a salary of £1500 a year, and some other advantages, sees the corporation about to be quashed and destroyed. It is very natural

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he should ask for compensation, and, for aught I know, £5000 was not an extravagant amount of compensation. But then he should have said so openly. That is the sting of the whole case. If he had done so, the shareholders, who have means of judging of this gentleman's character, which I have not, would have had an opportunity of considering whether he was a person who was likely to give them disinterested advice as to a transaction in the completion of which he had himself so direct an interest. But he studiously keeps it secret; and what is strange is, that I find one of the directors of the bank writing to tell him how he can best tell a lie to keep it secret. It is impossible to pass by anything so scandalous as that, when it is brought before the attention of the Court. But I pass by this charge of fraud because I think, on the authority of *Foss* v. *Harbottle* (1), and *Lord* v. *Copper Miners' Company* (2), that the Plaintiff would not have been entitled to file a bill on behalf of himself and all the other shareholders on such a fraud as that. The bank shareholders might have met afterwards, and if the thing were *intrà vires*, might have said, "we were all misled, but upon consideration we agree to the thing being done." If the case be really *intrà vires*, it is for the company to judge how they will punish the directors who have misconducted themselves, either by dismissing them, or otherwise, or how they will deal with the whole affair. If, on the other hand, the case be *ultrà vires*, I have already decided in the Plaintiff's favour on grounds apart from those of fraud altogether.

At the same time I do not think the Plaintiff was bound to have kept back all these circumstances on which he alleges fraud, and not to have stated them. They were part of the *res gestæ*; and the Plaintiff's object has been to shew not only that these things were *ultrà vires*, but that they were so with the knowledge of the parties. If it had been intended to object to these paragraphs, the better way would have been to have moved to have them struck out for impertinence. I do not think, therefore, as to that part of the case, that there should be any difference as to costs.

But there is another part of the case which appears to me not to stand in the same position. There is another set of charges which appear to me not only not proved, but (independently, as I

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(1) 2 Hare, 461. (2) 2 Ph. 740.

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admit, of strict proof) not to be the fact. They are to be found in those paragraphs of the bill which charge the corporation directors with having corruptly misstated the accounts, and represented the assets to be of greater value than they knew them to be, with a view of augmenting their own fees. I do not think those allegations are established; nor do I think that the bank would have given £80,000 for the assets of the corporation unless they had had a much better opinion of the assets than events have justified. I think that the assets may have been good enough in the hands of any other than a banking company; but that they turned out unprofitably in their hands, because not easily realizable. I think that these paragraphs were unnecessary, and formed no part of the history of the amalgamation; and that the additional increment of fraud which they attempt to establish, in further disparagement of the position of the directors, is wholly unfounded. I must, therefore, give all the Defendants their costs, so far as they have been increased by these paragraphs of the bill.

But as to the rest, I think the Plaintiff is entitled to his costs against the directors of the corporation who joined in answering.

As regards Dr. *Collum* and Mr. *Cotterell,* they stand in a different position from the other directors. Dr. *Collum* appears to have been removed by the managing director, as being too nervous and fidgety a person, and he says he was driven into the background, and was not aware of what was being done. He seems, however, to have been present at some part of the meeting which was convened by the fraudulent circular; but apparently he did not see what ought, I think, to have struck him, namely, that the circular may have kept many persons from attending the meeting who might otherwise have done so. At all events, I cannot give costs either to Dr. *Collum* or Mr. *Cotterell,* for I do not see how the Plaintiff could have separated them from the other directors until the answers came in; but I think I may exempt them from paying costs, inasmuch as they did not assist in the transaction.

The Defendants *Key* and *Evans,* the liquidators, must have their costs.

Mr. *Miller* asked that (as to the paragraphs above mentioned) one set of costs only might be allowed to Dr. *Collum* and Mr. *Cotterell.*

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Mr. *Kay* said that Dr. *Collum* was in a different position, as being one of the liquidators.

The Vice-Chancellor said that in such a case as this, involving charges of fraud, he could not bind these two Defendants to answer together.

Mr. *Druce* asked for the Defendant *Pappa's* costs. He was not a director.

The Vice-Chancellor said he must leave the Defendant *Pappa* to be indemnified by the bank. He should not make him pay costs.

Mr. *Miller* asked that the costs of the orders for liberty to carry on the suit in each winding-up might be included in the Plaintiff's costs.

The Vice-Chancellor assented, and made the following order: The Plaintiff is to have his costs of the suit, including those of the applications in the windings-up, against the directors who joined in the answer of *Goodson*, and against the bank, and the directors of the bank. The Defendants *Key* and *Evans* to have their costs paid by the Plaintiff and added to his own. The costs occasioned to the Defendants (other than *Key* and *Evans*) by the statements in the bill in the paragraphs referred to be taxed separately. The Defendants (other than the *Corporation, Key, Evans, Collum, Cotterell,* and *Pappa*) to pay the Plaintiff's costs, he paying to the Defendants the excepted costs.

Solicitors for the Plaintiff: Messrs. *Nelson & Goodman.*

Solicitors for the Defendants, the Corporation, and Messrs. *Collum* and *Cotterell:* Messrs. *Flux, Argles, & Rawlins.*

Solicitors for the Bank, its Directors and Managers: Messrs. *Uptons, Johnson, & Upton.*

Solicitors for the Corporation Directors: Messrs. *Young, Maples, Teesdale, & Nelson.*

Solicitors for Mr. *George Smith:* Messrs. *Thomas & Hollams.*

Solicitors for Mr. *Walford:* Messrs. *Cox & Sons.*

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V.-C. M.

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July 1, 2, 3, 4, 5, 6, 8, 9; *Dec.* 21.

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Feb. 22, 23; *March* 10.

11 Eq 485

14 Eq 131,

Vendor and Purchaser—Contract—Sub-contract—Misrepresentation—Refusal of Sub-purchaser to complete—Cancellation of Original Contract—Right of Sub-purchaser to recover Instalments of Purchase-money—Lien—Jurisdiction—Bonds of Company being wound up—Parties—Third Parties interested in Contract.

W. agreed in writing to purchase from *B.* a mineral estate for £250,000, payable by instalments, and subsequently agreed in writing to sell the same property to a company which he had promoted, the price to be £350,000, payable by instalments, and as to £75,000 of it, payable in the company's bonds. Both agreements provided that the estate, as to extent of acreage, should be taken as conclusively shewn by the title deeds, and neither agreement specified the acreage, but *B.* told *W.*, and *W.* told the company, that it contained 1530 acres, both *B.* and *W.* believing the statement to be true. The company, before they made the agreement, had the estate inspected and valued by a mining surveyor, but there was no evidence as to whether or not he measured it. After *W.* had paid *B.* £50,000, and the company had paid *W.* £75,000, and given him their bonds for £75,000, the company refused to complete their purchase, alleging that the estate contained less than 1100 acres. *W.* thereupon refused to complete his purchase on the same ground, and brought an action against *B.* to recover the £50,000, and also for damages. *B.* offered to *W.* to reduce his purchase-money by £50,000, and *W.* made a like offer to the company, but both offers were refused. The action was compromised, *B.* repaying to *W.* the £50,000, and the agreement between them being cancelled by mutual consent. The company was wound up, and the official liquidator, six months after the company's repudiation of the purchase, instituted a suit against *W.* for the cancellation of their contract, for the repayment and return by *W.* of the £75,000 and bonds, and for an injunction to restrain *W.* from negotiating or parting with the bonds. The bill did not allege that the deficiency of acreage in fact existed, and there was no evidence on the subject. £5000, part of the £50,000 repaid by *B.* to *W.*, was paid into Court under an order in the cause:—

Held, that the company were not entitled to have the contract rescinded on the ground of misrepresentation; that they could not sustain a suit in equity to recover the instalments of purchase-money; that they had no lien on the £50,000 repaid by *B.* to *W.*; and that as to the bonds the suit was unnecessary, because they could only be assigned by *W.* subject to the equities between him and the company, and also because the company could not be sued upon them without the leave of the Court; and the bill was dismissed without prejudice to any rights at law.

After his agreement with *B.*, *W.* agreed with *C.*, *D.*, and *E.*, to share with them in certain proportions the profit to be made by the resale of the estate; *W.*, *C.*, *D.*, and *E.*, together got up the company, and part of the money received by *W.* from the company was disposed of by them jointly. *C.*, *D.*, and *E.*, were made parties to the suit, and the bill sought to make them liable to the company for the money and bonds received by *W.*:—

Held, that they were not so liable, and were improperly made parties to the suit.

Revd by L.C. 4 Ch 101,

On the 23rd of June, 1864, *Crawshay Bailey*, the owner of an estate in *Glamorganshire*, part freehold and part leasehold, called the *Aberaman* estate, upon which he had for some years carried on ironworks and a colliery, entered into a written agreement with *Henry Wickens* for the sale to *Wickens* of the estate, together with the plant, machinery, stock, railways, tramways, and all other property and effects in, upon, and under, and appurtenant to, and used in connection with it, and the goodwill of the business, for £250,000.

The following were the material provisions of the agreement:—

The purchase-money was to be paid as follows: £10,000 on signing the agreement, £115,000 within three months after the delivery of the abstract, and £125,000 in two years after the date of the agreement. The property was to be conveyed to *Wickens* on payment of the £115,000, and the £125,000, with interest at £5 per cent., was to be secured by a mortgage of the property to *Bailey*.

The estate, "as to extent of acreage and other matter of description," was to be "taken as conclusively shewn and defined by" the deeds of conveyance to *Bailey* in 1836 and 1837, with which the abstract of title was to commence, "without further evidence."

If the purchase should not be completed within the three months by the default of the purchaser, the £10,000 was to be forfeited to *Bailey*, who should thereupon be at liberty to retain or resell the property discharged from the agreement, and to appropriate the £10,000 to his own use.

Wickens on the same day paid the first instalment of £10,000. This sum he borrowed from *Josiah Wilkinson*, to whom he agreed to pay £5000 as a remuneration for the loan out of the purchase-money which he should receive on a resale of the property, and as a security for the repayment of the £10,000, he deposited the agreement with *Wilkinson*, with a written undertaking not to deal with it or the property without *Wilkinson's* concurrence.

Before the 23rd of June *Bailey* had agreed to sell the same property to one *Markwick*, and *Markwick* had been negotiating for the sale of this contract (which *Bailey* alleged to have been determined by lapse of time) to *William Sarl*. This led to negotiations between *Wickens* and *Wilkinson* on the one hand, and *Sarl* and *John James Sudlow*, whom *Sarl* had requested to assist him in raising money for the purpose of the speculation, on the other hand. On the 8th of August a memorandum was signed by *Wickens* and *Sarl*, which purported to be "Terms of agreement between Mr. *Sarl* and his party, and Mr. *Wickens* and his party, relative to the purchase and sale of the *Aberaman* estate," by which it was agreed "that Mr. *Sarl* and his party should obtain, and immediately pay to *Wilkinson*, on behalf of *Wickens*, the sum of £10,000, the deposit already paid on the contract (of the 23rd of June), and that all parties should concur in the constitution and establishment of a public company for the purpose of selling the property; that the price at which the property should be sold, and the mode of establishing the company, should be the subject of mutual agreement between "Mr. *Sarl* and his party" and "Mr. *Wickens* and his party," and that all net profit to be derived from the resale should be divided and paid in the following proportions: "three-fifths to Mr. *Wickens* for him and his party, and two-fifths to Mr. *Sarl* for him and his party;" that "Mr. *Sarl* and his party" should obtain a release of *Markwick's* claims, and that any payment to be made in respect of such claims should be a charge upon the two-fifths of the profit attributable to "Mr. *Sarl* and his party," and that upon Mr. *Sarl* or his party acquiring *Markwick's* interest, the same was to enure for the benefit of the company. The agreement was to be binding only in the event of the *Credit Mobilier* bringing out the company forthwith.

Shortly afterwards *Sarl* and *Sudlow* obtained a loan of £15,000 upon a deposit of the contract of the 23rd of June, and out of that sum the £10,000 was repaid to *Wilkinson*, and £5000 was paid to *Markwick* to get rid of his claim. Meanwhile, *Wickens*, *Wilkinson*, *Sarl*, and *Sudlow* were endeavouring to get up a company for the purchase of the property, and after an abortive negotiation with the *Credit Mobilier* they induced the *Financial Corporation* to bring out the proposed company in consideration of £2000 to be paid to them by the four promoters within a month after the allotment of shares; and by an agreement dated the 18th of August, and signed by the four promoters, and by two of the directors and the secretary of the *Financial Corporation*, it was agreed that the corporation or their nominees should apply for 4000 shares in the company, and pay a deposit of £1 per share, in consideration of which they were to receive £8000 in addition to the £2000, but they were to be at liberty at any time before actual allotment to withdraw their application as to the whole or any portion of the 4000 shares, and thereupon to receive back the deposit on such shares, and in the event of such withdrawal they should only receive a proportionate payment, viz., £2 per share in respect of the shares applied for and not withdrawn, and that the allotment of the shares applied for by them should not be made without their consent.

On the 23rd of August a company was registered under the name of the *Aberaman Ironworks, Limited*, with a nominal capital of £500,000 in 10,000 shares of £50 each. The objects of the company, as stated by the memorandum of association, were "to purchase of the vendee of *Crawshay Bailey*, Esq., the land and estate known as the *Aberaman* estate, and the works and collieries thereon, and the mines, minerals, and other estate thereunder, and the plant, machinery, stock, apparatus, and other property and effects in, upon, and under the said estate, works, mines, and minerals, and the goodwill of the business thereof as lately held and enjoyed by *Crawshay Bailey*, Esq., for the agreed sum of £350,000, and to carry on the trade and business of miners and manufacturers of iron and other metal, colliers and coal merchants, &c." By the articles eight persons were appointed directors, four of whom had been induced to act by *Wilkinson*, who paid the deposits on the shares of two of them. About the same time a prospectus of the company was issued, the draft of which was prepared by *Wickens*, which described the property as extending over an area of 1530 acres. This statement was made upon the representation of *Wickens* from the information given to him by the agent of *Bailey*. Before purchasing the property *Wickens* had employed *Richardson*, a surveyor, to inspect it, but his report did not specify the acreage, though it stated fully the amounts of coal and ironstone which the estate was estimated to contain. The prospectus contained extracts from the reports of *Richardson*, and *Jones*, the engineer of the ironworks and collieries.

At the end of August three of the directors, accompanied by Mr. *Blackwell*, a mineral surveyor, inspected the property, and *Blackwell* made a full and detailed report, in which he stated that the estate consisted of 1510 acres of land and mines, that it contained at least 45,000,000 tons of coal, that it was well worth £350,000, and might be expected, at the very lowest estimate, to produce a profit of £58,800 per annum. On the 6th of September *Blackwell* attended a meeting of the directors, and produced an abstract of his report, which was circulated among the shareholders. The report did not state, and there was no evidence to shew, whether or not *Blackwell* measured the estate.

On the 5th of September the directors allotted 5629 shares out of 12,817 applications. The *Financial Corporation* were allowed to withdraw the applications for 3250 out of the 4000 shares for which they had applied in pursuance of their agreement with the four promoters, and the deposits of £1 per share were returned to them.

On the 23rd of September a further agreement was made between *Wickens* and *Bailey*, by which, after reciting that the second instalment of £115,000 would, under the previous agreement, be payable on the 18th of the following October, it was agreed that £40,000 only should be paid on that day, and the remaining £75,000 on the 20th of January, 1865, with a proviso that if the purchase should not be completed on the latter day the £40,000, as well as the £10,000, should be forfeited.

On the 27th of September an agreement for the sale of the property by *Wickens* to the company for £350,000 was signed by *Wickens*, and sealed with the company's seal. This agreement was, *mutatis mutandis*, identical in its terms with that of the 23rd of June, except the provisions for the payment of the purchase-money, which were as follows:—£30,000 was to be paid in cash within two days after the date of the agreement, £40,000 in cash on the 15th of October, £80,000 in cash on the 15th of January, 1865, when the property was to be conveyed to the company, £75,000 in bonds of the company for £50 each, bearing interest at 6 per cent., the principal in half of the bonds to be payable three years, and in the other half five years, after date, to be delivered to *Wickens* or his nominees within fourteen days after the allotment of the shares of the company, and the remaining £125,000 to be secured by a mortgage of the property for two years from the 23rd of June, 1864. The agreement provided that if the purchase were not completed as aforesaid within the aforesaid period by any default of the company, the £30,000 and £40,000 should be forfeited to *Wickens*, who should be thereupon at liberty to retain or resell the property discharged from the agreement. Neither this contract nor the contract of the 23rd of June contained any statement of the acreage of the estate. On the same day £28,500 was paid by the company to *Wickens* (£1500 being retained by the directors under a separate agreement as a guarantee against the preliminary expenses of the company), and was paid by him into a bank to the account of himself, *Wilkinson*, *Sudlow*, and *Sarl*. Out of this money the £15,000 which had been borrowed for the purpose of paying £10,000 to *Wilkinson*, and £5000 to *Markwick*, was repaid, and £1335 was paid to the *Financial Corporation* as an indemnity for loss incurred by them in buying and selling shares of the company for the purpose of rigging the market at the request of the promoters, and the deposits were paid on shares allotted to the four promoters or their nominees. Upon the execution of the contract by the company, *Wickens* signed and gave to the directors a written guarantee, by which he undertook to increase the share list up to 8000 shares, and that upon the shares taken by his friends and nominees £10 should be paid, when called, to the extent of 4000 shares, and authorized the directors to deduct the amount due upon such shares from the purchase-money.

The abstract of title was delivered to the company's solicitors some time before the date of the contract, and they sent their requisitions on the 30th of September. Some time in October 1500 bonds of the company, for £50 each, were delivered to *Wickens* by the directors, but before delivering the bonds the directors required that *Wilkinson*, *Sudlow*, and *Sarl* should concur in the guarantee given by *Wickens* on the 27th of September, which was done, *Sudlow* and *Sarl* signing the guarantee, and *Wickens* signing it on behalf and by the authority of *Wilkinson*, who was then in *Ireland*.

On the 4th of November *Wickens, Sarl,* and *Sudlow* signed a document in these words: "It is understood and agreed between us, the undersigned, that the expression 'Mr. *Wickens* and his party,' and 'Mr. *Sarl* and his party,' mentioned in a previous document, means, and should be construed to mean, as follows: 'Mr. *Wickens* and his party' means Mr. *Wickens* and Mr. *J. Wilkinson,* and 'Mr. *Sarl* and his party,' Mr. *Sarl* and Mr. *J. J. Sudlow.*" On the same day *Wickens* wrote a letter to *Wilkinson,* informing him that he had signed this document, and had also signed for him the guarantee as to the shares, and that he held the bonds "on behalf of all four of us," to which *Wilkinson* replied, by a letter of the 6th of November, in these words: "I was delighted to receive your good news. I hope you will carry out the sale of the bonds at 10 per cent. discount. Pray let me know if you have done so."

On the 10th of November, in order to provide for the second instalments of purchase-money under the two agreements, the promoters procured for the company a loan of £25,000 from the *London and County Bank,* as a collateral security for which *Wickens,* with the consent of the other three, deposited 800 of the bonds. The company paid *Wickens* on the same day £20,000, and on the 17th of November a further sum of £20,000, both of which sums he immediately paid over to *Bailey.* On the 9th of December the company paid *Wickens* £800.

From November, 1864, to January, 1865, the directors and the four promoters were jointly endeavouring to raise £200,000, to provide for the balance of the purchase-money payable to *Bailey* and *Wickens* under their respective contracts, upon a mortgage of the property. On the 16th of December *Wickens* informed the directors that he understood the mortgage was all but completed: on the 30th he told them that he was still using his best exertions as to the mortgage, but could not report definitely that it was arranged; on the 6th of January he told them that it was all but completed; on the 10th of January *Sarl* told them that the mortgage was ready to be completed, and produced a letter from the solicitors of the proposed mortgagee to that effect. On the 12th of January, at a meeting of the directors, which was attended by the four promoters, the following resolution was passed: "That a cheque

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for £5000, that being the balance of the purchase-money of the estate due to Mr. *Wickens* on the 15th of this month, as per statement in margin, be drawn and handed to him." The statement in the margin was as follows:—

	Paid.
£28,500	27 Sept. 1864.
500	
800	9 Dec. 1864.
29,800 say	
30,000	27 Sept. 1864.
20,000	10 Nov.
20,000	17 Nov.
75,000	Bonds.
200,000	Mortgage.
5,000	Cash.
	due 15th Jan. 1865.
350,000.	

The £5000 was accordingly paid to *Wickens*, and was applied by him in payment of money borrowed by the promoters for preliminary expenses.

On the 13th of January, *Wilkinson*, *Sudlow*, and *Sarl* were elected directors. At a meeting on the 20th of January, at which *Wickens* was present, *Sarl* informed his co-directors that the acreage of the *Aberaman* estate was only a little more than 1000 acres, and thereupon the directors wrote and handed to *Wickens* a letter calling upon him for an explanation of the alleged deficiency, and stating that they should not complete the purchase unless he could make good his representation that the estate contained 1530 acres. *Wickens* replied that he could give no explanation, but that he had sold to the company as *Bailey* had sold to him, and had taken *Bailey's* statements as to acreage as correct. It appeared that the company's balance at their bankers was then £1526. On the same day *Wickens* wrote to *Bailey* a letter, in which he declined to complete his purchase except upon proof that the estate contained 1530 acres. *Bailey's* solicitor, in reply, sent to *Wickens* the particulars of sale under which *Bailey* purchased the estate in 1836, giving the total acreage as 1528 acres, and *Wickens* forwarded them to the directors. On the 28th of February the directors wrote to *Wickens* pressing for a "prompt and satisfactory adjustment of the dispute," and threatening that, unless that were done within a few days, proceedings would be adopted against him and *Bailey* to enforce the fullest right of the company; and on the same day *Wickens* forwarded this letter to *Bailey.* On the 15th of March the company's solicitors wrote to *Wickens,* declining a suggestion made by him that the purchase-money should be reduced by £50,000, and threatening, unless they received from him within a week a satisfactory proposition, to commence proceedings to rescind the contract, and obtain a return of the instalments already paid, together with damages for the expense of forming the company. On the 23rd of March *Wickens* wrote to the solicitors, offering, without prejudice, if the company would at once pay him a further sum of £50,000, and execute a mortgage of the property for £100,000 at 5 per cent., to abandon the remaining £50,000 of the purchase-money.

About the same time *Wickens* refused a similar offer made to him by *Bailey,* and also an offer by *Bailey* to return the £50,000 already paid, without interest.

On the 24th of March the company's solicitors, in pursuance of a resolution of the directors, gave *Wickens* a formal notice that the company rescinded the contract of the 27th of September, 1864. To this notice *Wickens* sent, on the 25th of March, the following reply:—"I am in receipt of yours of yesterday's date on behalf of the company, and shall act accordingly." On the 31st of March he wrote to the secretary of the company, stating that he expected to hear from *Bailey* on the subject immediately. On the 3rd of April, *Bailey's* solicitor wrote to *Wickens* as follows:—"I have now seen Mr. *Bailey,* and as your letter does not accept either of the offers made to you by him, I treat the offer as at an end, and Mr. *Bailey* stands on the terms of his agreement, and holds to the forfeiture clause."

On the 4th of April *Wickens* replied as follows:—

"I received yours of yesterday's date, and in consequence I send a writ against Mr. *Bailey* for your undertaking to appear. I claim the repayment of the £50,000 cash I paid him, and £100,000 consequential damages. . . . There has been no forfeiture on my part. He represented the property to contain 1530 acres, when he knew it to be less than 1100 acres, and the purchase having been delayed by his default, he now puts an end to the contract, and seeks to appropriate to his own use the £50,000; but the law will teach him otherwise." . . . .

On the same day *Wickens* commenced an action against *Bailey* to recover the £50,000, and also for £100,000 damages, and on the same day he wrote to the company a letter, enclosing the letter of *Bailey's* solicitor, and his reply.

On the 11th of April, *Wickens* wrote to the directors as follows:—

"I have made no default whatever under my agreement with the company, and was ready and willing to perform it, but the company has failed to pay me the purchase-money at the times therein specified, and has also given me notice to rescind it."

On the 21st of April the directors, having been advised by counsel that the bonds would be a debt from the company to *Wickens*, proposed to *Wickens* that they should redeem the bonds (subject to the lien of the *London and County Bank*) for £18,000; *Wickens* declined this proposal, but offered to cede bonds to the amount of £55,000 upon certain terms. On the 18th of May he wrote to the directors withdrawing this offer, and concluded his letter as follows:—"I and the company must now stand on our respective rights in all matters and affairs between us."

On the 10th of June the company was ordered by Vice-Chancellor *Kindersley* to be wound up, and on the 26th of July an official liquidator was appointed.

The action commenced by *Wickens* against *Bailey* was compromised on the 17th of June, 1865, by the cancellation of their agreement, and the repayment by *Bailey* to *Wickens* of the £50,000, half in cash, and the other half in five bills of exchange for £5000, each payable on the 20th of October, 1865.

On the 11th of August the solicitors of the official liquidator applied to *Wickens*, by letter, to repay and return the £75,000 cash and the bonds for £75,000, paid and delivered to him under the agreement of the 27th of September, 1864; which he declined to do, insisting that the company had made default in completing the purchase, and that consequently the forfeiture clause in the agreement took effect.

On the 5th of September, 1865, the official liquidator filed the original bill in this suit in the name of the company against *Wickens, Wilkinson, Sudlow,* and *Sarl,* praying:—1. That the contract of the 27th of September, 1864, might be declared void and set aside. 2. That the Defendants might be decreed to repay and deliver to the official liquidator all sums of money or securities for money received by them, or either of them, from the company. 3. That *Wickens* might be restrained from negotiating, parting with, or disposing of the bonds issued to him by the company, or the five promissory notes or bills of exchange received from *Bailey.*

On the 10th of September a motion was made before Vice-Chancellor *Wood,* as Vacation Judge, for an injunction against *Wickens,* upon which no order was made upon *Wickens* undertaking not to negotiate, part with, or dispose of the bonds, or a bill of exchange for £5000 received from *Bailey,* which was the only one which remained in his possession. In February, 1866, £5000, the amount of this bill, was paid into Court in the cause.

Wickens, by his answer, insisted that, by reason of the default of the company in payment of the purchase-money under the agreement of the 27th of September, 1864, the moneys and bonds which had been paid and delivered to him in part payment of such purchase-money became absolutely forfeited to him before the 24th of March, 1865, and as to the alleged deficiency of acreage, he relied upon the doctrine *caveat emptor.*

Wilkinson, Sudlow, and *Sarl,* by their answers, denied that there was any subsisting agreement between them and *Wickens* for a division of the profits to be made by *Wickens* on the sale of the property, and submitted that, not being parties to the contract between *Wickens* and the company, they had been improperly made parties to the suit.

Wickens, by his answer, stated that on the 27th of June, 1864, he had entered into an agreement with two other persons named *Folch* and *Bennet,* for a division between them of the profit to be made by the sale of the *Aberaman* estate, and *Bennet* having served the Plaintiffs with a formal notice of that agreement, *Folch* and *Bennet* were made Defendants by amendment.

The bill did not allege that the estate in fact contained less than 1530 acres, and there was no evidence upon the question of the actual acreage.

The amended bill alleged that *Wickens* made the agreement of the 27th of September, 1864, as agent for the four promoters, and that the moneys and bonds received by him under it were dealt with by him as the joint property of himself and the other three. In support of this allegation numerous letters of the Defendants *Wilkinson*, *Sudlow*, and *Sarl*, were put in evidence, in which such expressions occurred as "the common interest," "our joint property," "we are all interested equally both as regards liabilities and profits."

It appeared from the directors' minute book that most of the directors' meetings were attended by the four promoters, or some of them.

Mr. *Baily*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Ferrers*, for the Plaintiffs:—

The company were justified in refusing to complete their purchase on the ground of the misrepresentation by *Wickens* of the acreage of the estate. That misrepresentation had, on *Wickens*' authority, been inserted in the prospectus, and all the shareholders who had been misled by it would have been entitled to be removed from the register, and have their deposits returned. It is true that the directors employed a surveyor to value the property before the contract, but it is clear that he did not measure it, but based his report upon the measurements given to him by *Bailey's* and *Wickens*' surveyors. But it is immaterial whether or not the refusal by the company to complete was justified, inasmuch as *Wickens* acquiesced in it, admitted the misrepresentation which he had made on the faith of the like misrepresentation to him by *Bailey*, informed *Bailey* that the deficiency was too great to justify him in completing his contract, brought an action against *Bailey* to recover the instalments of purchase-money, recovered these instalments, and cancelled his contract with *Bailey*, thereby making it impossible for him to fulfil his contract with the company. Under these circumstances he will not, unless the terms of the contract expressly require it, be allowed by a Court of equity to retain the £150,000 in cash and bonds which he has received from the company, and for which he has given and can give no consideration. The contract gives him no such right. The forfeiture clause was put an end to by the new arrangement as to the purchase-money stated in the minutes of the directors' meeting of the 12th of January, 1865. On that day *Wickens* received £5000, which completed the £100,000 profit to be made by him and the other promoters by the sale of the property to the company, and it was arranged that the remaining £200,000, the whole of which was payable to *Bailey*, should be raised by a mortgage of the property, which the promoters were negotiating, and which would have been obtained but for the discovery of the deficiency in acreage. After that meeting of the 12th of January, which *Wickens* attended, he could not have insisted on the forfeiture clause. Moreover, that clause does not apply to the bonds or to the £5000 paid on the 12th of January. The £50,000 recovered from *Bailey* was, in fact, the money of the company, and in order to prevent *Wickens* from parting with it, and with the bonds, they were obliged to come to a Court of equity.

The Defendants *Wilkinson, Sudlow,* and *Sarl,* are equally liable with *Wickens* to repay the money and return the bonds. It is clear from the agreement of the 8th of August, 1864, as explained by the memorandum of the 4th of November, and from the letters and conduct of the parties, that the agreement of the 27th of September, though made in the name of *Wickens* alone, was in fact made by him also as agent for the other three. They all agreed with the *Financial Corporation* to bring out the company; they all signed the guarantee to bring up the list of shareholders to 8000; the first instalment of purchase-money (£28,500) was paid into their joint account; the bonds were delivered to *Wickens* by their joint direction; they all concurred in procuring the loan of £25,000 from the *London and County Bank,* in order to provide the second instalment of the purchase-money payable to *Bailey;* they all constantly attended the directors' meetings, and they all took part in negotiating the mortgage for £200,000; and in their letters they speak of the "joint property," and "common interest." It was, in fact, a joint adventure in the nature of a partnership; and though *Wickens,* he alone having been a party to the contract with

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Bailey, was put forward nominally as the sole contracting party with the company, yet all four were substantially parties to the contract, and treated with the directors on that footing throughout.

The Defendants *Folch* and *Bennet* must pay their own costs, or if the Plaintiffs pay their costs, they must be repaid by *Wickens*, at whose suggestion they were made parties.

Mr. *Karslake*, Q.C., and Mr. *J. N. Higgins*, for *Wickens* :—

The deficiency of acreage, which was the only ground upon which the company claimed to rescind their contract, has never been proved, and is not even alleged by the bill; the suggestion may have arisen from a confusion between English and Welsh acres; and it was no doubt intended, both by the company and *Wickens*, to be used for the purpose of obtaining from *Bailey* an abatement of the purchase-money. But even if the deficiency had been proved to exist, the company could not, having regard to the clause in the agreement which provided that the acreage should be taken as shewn by the deeds, to the nature and ascertained value of the property, and to the facts that they had employed their own surveyor to value the property, and that the abstract of title had been delivered to them before they made the agreement, have maintained a suit to set aside the agreement on that ground: *Attwood* v. *Small* (1). A party who seeks to be relieved from a contract on the ground of misrepresentation must not sleep upon his rights: *Jennings* v. *Broughton* (2). But in this case the alleged misrepresentation was discovered on the 20th of January; *Wickens* distinctly put the company at arm's length on the 22nd of April, and the bill was not filed until the 5th of September. It is evident that the company did not consider themselves entitled to rescind the contract and recover the instalments of purchase-money; for after the formal notice of the 24th of March they continued, by the advice of counsel, to negotiate with *Wickens* for the redemption of the bonds, and if *Wickens* was entitled to retain the bonds, he was clearly entitled, *à fortiori*, to retain the £70,000 under the forfeiture clause in the agreement. That clause came into operation on the 15th of January, when the company, from want of funds, were unable to pay the third

(1) 6 Cl. & F. 232.

(2) 5 D. M. & G. 126.

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instalment of the purchase-money. The resolution of the directors on the 12th of January could not affect *Wickens*' rights, nor did he, by accepting £5000 on account of the purchase-money, or by assisting the directors to procure £200,000 on mortgage of the estate, for the purpose of completing their purchase, waive his right to insist on the forfeiture. The company having failed to perform their contract, *Wickens* had a right to resell the property, or to get rid of his contract with *Bailey*, and to retain the instalments of purchase-money: Lord *St. Leonards*' Vendors and Purchasers (1); *Lethbridge* v. *Kirkman* (2); and having, as the company well knew, no means of completing his purchase except with the money to be produced by the sale to them, he was compelled to rescind his contract with *Bailey;* but he did not rescind it until after the company had been ordered to be wound up, and it was impossible for them to complete the purchase. The real question, however, is whether, on the 24th of March, 1865, the company could have rescinded the contract and recovered the purchase-money; and we contend that on that day the company had made default, and *Wickens* was entitled to retain the property and the purchase-money. The bill, therefore, wholly fails. But if the Court should be of opinion that *Wickens* ought to return any part of the purchase-money, he ought to be allowed to set off the payments which he has made, and the liabilities which he has incurred, in respect of shares in the company, which he agreed to take on the faith of the agreement of the company to purchase the estate.

Mr. *Glasse*, Q.C., and Mr. *Pearson*, Q.C., for *Wilkinson*:—

Wilkinson was not a party to the contract, and he ought not to have been a party to a suit to rescind it: *Tasker* v. *Small* (3). The evidence wholly fails to support the allegation that *Wickens* contracted as agent for *Wilkinson*. *Wilkinson* was to receive a bonus of £5000 from *Wickens* out of the profit to be made by a resale, and therefore he had a strong interest in promoting the sale to the company, but that did not constitute a partnership between him and *Wickens*, so as to make him liable for *Wickens*'

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(1) 14th Ed. p. 41.

(2) 25 L. J. (Q. B.) 89. 2 Jur NS 372.

(3) 3 My. & Cr. 63.

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acts: *Cox* v. *Hickman* (1); *In re English and Irish Church Assurance Society* (2); nor did it create any privity between *Wilkinson* and the company. The company treated *Wickens* throughout as the sole vendor and gave him notice to rescind the contract without consulting *Wilkinson*. Assuming that the company can recover the purchase-money from *Wickens*, they cannot follow it in the hands of the other Defendants; the £50,000 repaid by *Bailey* was received by *Wickens* alone, and he alone has possession of and control over the bonds.

[As to the right of the company to rescind the contract and recover the purchase-money, they claimed the benefit of the arguments of *Wickens*' counsel, and referred to *Morley* v. *Cook* (3); *Beavan* v. *M'Donnell* (4).]

Mr. *Fry*, for *Sudlow*:—

The bill does not allege a partnership between *Wickens* and the other three promoters. The agreement of the 8th of August was conditional on an event which did not happen, namely, the *Credit Mobilier* bringing out the company. But, assuming that *Sudlow* was entitled to a share of the profits of the sale, that did not make him liable to the company under the contract made by *Wickens*. Except in the case of partnership, which implies the agency of one partner for another, co-ownership of property does not involve liability for the acts of the other co-owners in relation to the property. Thus in the case of co-owners of a ship, there is no such implied agency as to create joint liability, nor in the case of co-patentees: *Hancock* v. *Bewley* (5). One promoter of a company is not liable for the acts of other promoters without proof of express agency. Here the agency is not proved, and it is denied by the Defendants.

Mr. *Hastings*, for *Sarl*:—

The purchase-money and bonds which the bill seeks to recover were paid and delivered by the company to *Wickens* alone. The other Defendants could not have been made parties to a suit for the specific performance of the contract, and the same rule applies to a suit to rescind it. As to the right of the company to recover the purchase-money, he cited *Duckett* v. *Williams* (1).

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(1) 8 H. L. C. 268. 7 Jur NS/105
(2) 1 H. & M. 85.
(3) 2 Hare, 106.
(4) 9 Ex. 309.
(5) Joh. 601.

Mr. *Bardswell*, for *Folch*, contended that he ought not to have been made a party, and asked for his costs.

Mr. *T. Hughes*, for *Bennet*.

Mr. *Baily*, in reply :—

All parties having admitted the alleged deficiency of acreage, and *Wickens* having, upon the ground of such deficiency, cancelled his contract with *Bailey*, it is immaterial for the purposes of this suit whether or not the deficiency really existed, and it was impossible for the Plaintiffs, who have no privity with *Bailey*, to obtain any evidence on that question. The allegation was originally made by *Sarl*, probably with the connivance of *Wickens* and the other promoters, who, having received the whole of the £100,000 profit on the resale, and being under heavy liabilities for calls on their shares, which would be required for the completion of the purchase, were interested in breaking off the sale, and dissolving the company. The contract with *Bailey*, though not formally cancelled until the 17th of June, was virtually broken off on the 4th of April, when *Wickens* commenced the action for the return of the purchase-money. On the 12th of January all parties had agreed that £200,000 was to be raised by a mortgage of the property, and they all knew that the mortgage could not be completed by the 15th of January; unless, therefore, the effect of the arrangement then made was to get rid of the forfeiture clause, it would follow that the company paid *Wickens* £5000 which they were not bound to pay, with the absolute certainty that in three days the contract must fail, and £70,000 must be forfeited to *Wickens*. It is clear, therefore, that the forfeiture clause was abandoned, and the cases of *Duckett* v. *Williams*, and *Beavan* v. *M'Donnell* (2), in both of which the forfeiture was expressly stipulated for, have no bearing on this case.

As to the other Defendants, we do not rely on the law of partnership, but we say that it is a case of express agency. The four were,

(1) 2 Cr. & M. 348.

(2) 9 Ex. 309.

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in equity, co-owners of the estate, and *Wickens*, with the consent of the others, sold it to the company, and received the instalments of purchase-money on behalf of and for the benefit of the four; they are, therefore, jointly liable to repay those instalments, or, at all events, the £28,500 which was paid to their joint account.

Dec. 21. The Vice-Chancellor, after stating that he had ineffectually attempted to induce the parties to compromise, desired that the case might be re-argued upon the question whether, assuming the contract to have been rescinded before the bill was filed, the bill was sustainable as a bill to recover the money and bonds paid and delivered to *Wickens* as instalments of purchase-money under the contract.

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Feb. 22. Sir *Roundell Palmer*, Q.C., for the Plaintiffs:—

The bill is sustainable on three grounds. First: because the right of the Plaintiffs to rescind the contract is founded upon a collateral misrepresentation not appearing on the face of the contract, which would not be available at law as a defence to an action on the contract: *Powell* v. *Edmunds* (1). Secondly: because the Plaintiffs are entitled to an equitable lien on the £50,000 recovered by *Wickens* from *Bailey* for the instalments of purchase-money which they have paid. The right of a purchaser to a lien on the property agreed to be sold, or on the vendor's interest therein, for the deposit which he has paid to the vendor, is now well settled: *Wythes* v. *Lee* (2); *Rose* v. *Watson* (3). Here the Plaintiffs had a lien on *Wickens'* interest in the estate, under his agreement with *Bailey*, and when *Wickens* put an end to that agreement and lost that interest, but received from *Bailey* the £50,000, the lien of the Plaintiffs attached to the £50,000 which was substituted for *Wickens'* interest in the estate. Thirdly: because the bill seeks to restrain the Defendants from negotiating the bonds and the bill of exchange for £5000; and as to the latter, Vice-Chancellor *Wood*

(1) 12 East, 6.

(2) 3 Drew 396. 2 Jur NS 7

(3) 10 H. L. C. 672. 10 Jur NS 297

put *Wickens* upon an undertaking which has led to the money being paid into Court.

Mr. *Karslake*, Q.C., for *Wickens*:—

The real question in the case is, whether the non-completion of the purchase was caused by the default of the company, and that question could be, and ought to be, decided by an action at law to recover the deposit, or, as the company is being wound up, the whole matter might have been dealt with by summons in the winding-up. The case of misrepresentation having wholly failed, the suit is simply a suit to recover the instalments of purchase-money, and no such relief can be obtained in equity: *Williams* v. *Edwards* (1); *Bennet College* v. *Carey* (2); *Gee* v. *Pearse* (3); *Ewing* v. *Osbaldiston* (4); *Sainsbury* v. *Jones* (5). There can be no question of lien in this case, for there is no property to which the lien could attach. In *Wythes* v. *Lee* (6) the contract had failed through the vendor's default, and the bill prayed for a lien on the estate; there the Vice-Chancellor overruled the demurrer, but did not decide the question of the right to a lien. In *Rose* v. *Watson* (7) the vendor failed to perform his contract, and the purchaser was held to be entitled to a lien on the estate. As to the bonds, the suit is unnecessary, for if the company are entitled to recover the instalments of the purchase-money, they have a good defence to any action on the bonds, of which they can avail themselves against assignees of the bonds as well as against *Wickens*: *Pinkett* v. *Wright* (8); *Clack* v. *Holland* (9); *Athenæum Life Assurance Society* v. *Pooley* (10); moreover, as the company is being wound up, no such action can be commenced without the leave of the Court.

Mr. *Glasse*, Q.C., for *Wilkinson*, declined to add anything to his former argument.

Sir *Roundell Palmer*, in reply:—

Wickens admitted the misrepresentation made by him, and, on

(1) 2 Sim. 78.
(2) 3 Bro. C. C. 390.
(3) 2 De G. & Sm. 325.
(4) 2 My. & Cr. 53.
(5) 5 My. & Cr. 1.
(6) 3 Drew. 396. 2 Jur NS 7
(7) 10 H. L. C. 672. 10 Jur NS 297
(8) 2 Hare, 120.
(9) 19 Beav. 262.
(10) 3 De G. & J. 294. 4 Jur NS 371

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the ground of a similar misrepresentation made to him by *Bailey*, refused to complete his purchase from *Bailey*, even with an abatement of £50,000 from the purchase-money, and sued *Bailey* for a return of the deposit, and for damages, keeping the company informed of all these proceedings, and ultimately recovered his deposit and cancelled the agreement with *Bailey*. How can he be allowed now to deny the misrepresentation, and say that the purchase went off by the company's default, and that they can have no relief in equity? *Bennet College* v. *Carey* (1), *Williams* v. *Edwards* (2), and *Gee* v. *Pearse* (3), were suits for specific performance in which the bill was dismissed; in *Ewing* v. *Osbaldiston* (4) the contract was illegal, and to have enforced a lien would have been to give the Plaintiff, to that extent, the benefit of an illegal contract; in *Sainsbury* v. *Jones* (5) the bill for specific performance was dismissed, on the ground that the person who contracted as agent had no authority to contract, and in that case the deposit had been paid to him as agent for other parties who were not parties to the appeal. A vendor who resells the property upon which the purchaser had a lien for the deposit, makes himself a trustee for the purchaser, to the extent of his lien, of the money received upon the resale. The right of the Plaintiffs to be protected against the bonds is of itself sufficient to give this Court jurisdiction over the whole subject matter of the suit. If the Court should think that *Wickens* has expended any part of the money for the benefit of the company, it may direct that credit be given to him for such expenditure, or it may direct an inquiry on the subject.

Mar. 10. Sir R. MALINS, V.C., after fully stating the facts up to and inclusive of the meeting of the 20th of January, 1865, and observing that, after the inspection of the estate and works by the deputation of directors and their surveyor, Mr. *Blackwell*, and his report, the company had no excuse for not knowing the acreage of the estate if they considered it important, and that the allotment of only 5629 out of the 12,869 shares which had been applied for, and the return of the money deposited by the *Financial Corporation*, were the original causes of the failure of the purchase, and that, as they had only £1526 at their bankers on the 20th of January, 1865, they were probably anxious to get rid of the contract, continued :—

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(1) 3 Bro. C. C. 390.
(2) 2 Sim. 78.
(3) 2 De G. & Sm. 325.
(4) 2 My. & Cr. 53.
(5) 5 My. & Cr. 1.

I believe that the statement which was made by *Wickens* at the meeting of the 20th of January was perfectly true. I am satisfied that neither he nor Mr. *Bailey* had any suspicion that the estate did not contain the quantity of acres which throughout the transaction it had been assumed to contain. It appears that the particulars under which Mr. *Bailey* himself bought, in 1836 or 1837, stated the quantity to be 1528A. 3P. It is certainly one of the most remarkable parts of this case, that none of the parties, up to the hearing of the cause, knew what really was the quantity of the estate. The bill does not state it, nor is there a particle of evidence to shew it; so that this cause, in which the right of the Plaintiffs to be relieved from the contract and to be repaid all sums paid under it, is founded on a deficiency in the quantity of the estate, is brought to the hearing without any evidence or statement whatever as to what quantity of land the estate really contains, and I very strongly suspect that, if it were now measured, it would be found that there is no material deficiency whatever. At all events, the parties had had ample opportunity to measure it before the contract was entered into; and, even assuming the alleged deficiency to exist, I am of opinion that it was, under the circumstances, no ground whatever for rescinding the contract. The parties in this case should have borne in mind the doctrines established by the House of Lords in the great case of *Attwood* v. *Small* (1), where the whole question of the rights of the parties turned on the cost of the production of pig iron. Mr. *Attwood* stated that pig iron could be made at his works at a certain price, and Lord *Lyndhurst*, in his celebrated judgment, rescinded the contract upon the ground of misrepresentation made by Mr. *Attwood* (whether intentionally or unintentionally is unimportant) as to the price at which pig iron at those works could be produced. That decision was reversed by the House of Lords, because it turned out that, instead of relying

(1) 6 Cl. & F. 232.

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upon Mr. *Attwood's* representations, the parties, by a deputation of their board, like the deputation in this case, had had ample opportunity of investigating, and had investigated, for themselves, and upon that investigation they had been satisfied, and therefore, relying upon their own investigation, they were not entitled to rely, and did not rely, upon Mr. *Attwood's* statement. The House of Lords therefore decided that there was no ground to rescind the contract, and the bill for that purpose was dismissed. In recent times the same doctrine has been acted upon in a case, which was cited and relied upon by the Defendants' counsel, of *Jennings* v. *Broughton* (1). Therefore, upon the ground that the company had ample opportunity of examining the property, the idea of their right to rescind the contract was, in my opinion, wholly unsustainable. A case for compensation there might have been, but the right of the purchasers could not go beyond that.

I am not sure that there was even a case for compensation for deficient quantity; but it is not necessary to consider that point, as a deduction from the purchase-money was soon afterwards offered, which was, in my opinion, more than ample compensation for the alleged deficiency. Mr. *Bailey* being apprised of the fact, and being desirous, I suppose, to avoid litigation, offered at once to take £50,000 off the purchase-money, and to reduce his purchase-money from £250,000 to £200,000. *Wickens*, in his turn, offered to reduce the purchase-money from £350,000 to £300,000, and as this company was carrying on a negotiation for £200,000 on mortgage, nothing would have been so simple as for them to say to the mortgagee, "We find the estate does not contain so much as we thought; our purchase-money has been reduced; instead of £200,000 we shall only want £150,000 from you:" and thus everything would have stood in the same relative position. But the truth is, that the company did not care about the quantity of the land; what they wanted, and what they would have obtained if they had completed their contract, was that which may be considered as practically an inexhaustible mineral field. Taking one-third from the quantity stated in the prospectus, they still would have had coal enough to give a supply of 1000 tons a day for 250 years. Mr. *Bailey*, with his great success, by

(1) 5 D. M. & G. 126. 17 Jun 905.

which he had realized a princely fortune and obtained an European celebrity, according to the prospectus, was not working more than 250 tons a day. Of black band vein there was enough to give a supply of 3000 tons of bar iron per annum, according to the prospectus, for a period of 520 years, and of argillaceous ironstone enough to give 26,000 tons of bar iron for more than 800 years. But when we consider that there is no appreciable difference in the value of an estate held for 99 years free of rent and a freehold—for I believe that it does not exceed 5 per cent.—what is the difference in the value of a mineral estate which will last 200 or 300 years? No coin is small enough to represent the difference in the value. That being an ample supply for all time that they could want, this is the explanation of the indifference of Mr. *Bailey* in his time, and of the company in their time, to the actual quantity of the estate. It is obvious, therefore, that this supposed deficiency of quantity was not the real motive for attempting to get rid of the contract. The truth is, that the lamentable mistake which was made by the directors in withholding the proper allotment of shares, and the mode in which they had conducted the business, had led them to doubt the means of carrying out their plans, and they were therefore anxious to find some excuse for getting out of the contract. It was the deficiency of funds, and not the deficiency of acres, which led to the objection, which I consider to have been made in a total want of good faith.

In the case of *Gee* v. *Pearse* (1), before Lord Justice *Knight Bruce* when Vice-Chancellor, there are some most valuable observations upon the obligation of a purchaser to be ready with his purchase-money. In that case the bill was filed by the purchaser for specific performance; he had been guilty of great delay, he had made various excuses for not performing his contract, and the Vice-Chancellor came to the conclusion that it was not those reasons which the Plaintiff had stated which led to the delay in the performance of the contract, but that he had not got his purchase-money ready; and in his judgment he lays down a rule, which, I think, ought never to be lost sight of by persons who enter into contracts for the purchase of estates, in these words (2): " By these materials altogether, I must say that there

(1) 2 De G. & Sm. 325.

(2) 2 De G. & Sm. 346.

appears to me to be disclosed a case of default on the Plaintiff's part sufficient to preclude him from a title to specific performance; but there have been formerly instances of such latitude of indulgence in point of time between vendors and purchasers, and so short (perhaps I should say, so comparatively short) a period elapsed in the present instance between the date of the earlier of the two contracts and the filing of the bill, not, I think, forty-seven weeks, and the circumstances of the particular case before me are in other respects such, that this may perhaps well appear a strong decision; nor is it a conclusion at which I have arrived without previous hesitation; but in a suit for specific performance especially, a Plaintiff must have more than a doubtful case: and though I do not say that the Plaintiff here bought speculatively, without knowing, and without having probable grounds for believing, that he should be prepared with money to pay in due time for what he bought, yet it is so much more fit to discourage than to encourage that kind of gambling with the fortunes and hopes of others. The consequences of disappointment in the receipt of purchase-money at the appointed time may in many cases be so serious and ruinous, that a purchaser not ready with the price according to his contract ought, I think, to shew a very special case for the interference of this Court against the vendor—certainly, in my judgment, one clearer and better than the Plaintiff has shewn here." [His Honour then proceeded to comment on the conduct of the Defendant *Sarl* in raising the objection, observing that he had probably so arranged matters that it was more to his advantage that his companions in the adventure should be sacrificed than that the contract should be performed, and continued :—]

I also think that the clause in the contract which stipulates that the estate, as to extent of acreage and other matter of description, shall be taken as conclusively shewn and defined by the deeds to be abstracted without further evidence, was a fatal bar to the right to rescind the contract. My interpretation of that clause is, that they were precluded from inquiry of this kind, and were bound to take the quantity as it was stated in the deeds. In every point of view, therefore, I think the attempt to rescind the contract was wholly unjustifiable. If, therefore, Mr. *Wickens* and Mr. *Bailey* had at this time pulled together, I am of opinion that they could

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have compelled the company to complete the contract, either with or without compensation, or to forfeit all the money which they had paid under it. I am necessarily occupying a great deal of time, and therefore I will not stay to refer to the doctrine of Sir *William Grant* in *Dyer* v. *Hargrave* (1), as to the principles upon which this Court will decree specific performance with compensation. I am of opinion that *Bailey* and *Wickens* together might either have enforced the contract or have compelled the forfeiture of all that had been paid; but, unfortunately for *Wickens*, that was not the course which he adopted. On the contrary, he complained to Mr. *Bailey*, and even went to the extent of accusing him of fraudulently deceiving him, for which accusation it is plain there was not the slightest foundation, and of this *Wickens* himself was subsequently satisfied, and he accordingly apologised for having made the accusation. [His Honour proceeded to state the facts subsequent to the 20th of January up to the 24th of March, observing that during that time the company still treated the contract as subsisting, and that, as the purchase included the goodwill of the business, and the plant and material, £50,000 was an ample reduction of the purchase-money in respect of the alleged deficiency of the land, and continued:—] The company had now given the notice to rescind on the 24th of March, and one would suppose that they would now, at all events, have considered that all relations between them and *Wickens* were at an end, except to recover their just rights, which they considered to be the return of the money which they had paid him. But so far from considering that the notice to rescind had given them the right to recover all the moneys paid to *Wickens*, and to treat the bonds as a nullity, negotiations went on from the 24th of March down to the winding up of the company for the purpose of the company buying up from Mr. *Wickens* the bonds which they had issued. This appears by the minutes of the directors' meetings of the 3rd, 11th, 18th, and 21st of April. It appears that after the notice to rescind they had consulted counsel, by whom they were advised that they had no right to recover the bonds; and I suppose, if they had no right to recover the bonds, it was the opinion of counsel also that they had no right to rescind the contract, and therefore no right to recover the money which they had paid. Having, therefore, been so advised, instead of treating themselves, as this bill treats them, as persons entitled to treat the contract as absolutely rescinded, out of which rescission grew the right to have the bonds cancelled and all money returned, they actually, on the 21st of April, just one month after they had given the notice to rescind, at a board meeting, resolved that the following proposition suggested at the board be submitted to *Wickens*, namely: "That upon Mr. *Wickens* handing over to the company the £35,000 bonds in his possession, and executing an assignment to the company of the remaining £40,000 bonds deposited with the *London and County Bank*, a cheque for £18,000 be handed to Mr. *Wickens.*" Now, therefore, one month after they had given notice to rescind the contract, they were willing and anxious to give Mr. *Wickens* £18,000 to surrender these bonds, which, according to the view submitted to me in this cause, ought to have been treated as mere waste paper. This was followed up by the meeting of the 27th of April, and there again there are very long minutes, still upon the subject of buying up these bonds in the hands of *Wickens*. After this meeting the company gradually languished; nothing more was done; the question with *Wickens* remained unsettled; and no demand appears to have been made for a return of the money which had been paid by the company until after the company had been ordered to be wound up. [His Honour proceeded to state the proceedings subsequent to the winding-up order, up to the hearing of the cause, observing that all that Vice-Chancellor *Wood* decided upon the motion for an injunction was that the proceeds of the bill for £5000 should be kept *in medio* until the rights of the parties could be decided at the hearing of the cause, and continued:—]

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(1) 10 Ves. 505.

Now by this bill the relief sought is threefold:—1st, a declaration that the contract of the 27th of September, 1864, is void; 2ndly, that the Defendant *Wickens*, and the other Defendants *Wilkinson*, *Sarl*, and *Sudlow*, ought to be ordered to refund or repay the £75,000 which had been received under the contract; and 3rdly, an injunction against dealing with the bonds for £75,000 which had been delivered to *Wickens*.

Assuming that the Plaintiffs are entitled to the relief sought against the Defendant *Wickens*, have they any right to relief

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against the other Defendants? It is clear upon the evidence, and indeed upon the admissions of the Defendants *Wilkinson*, *Sarl*, and *Sudlow* themselves, that they had an interest in the contract between the Defendant *Wickens* and the company, inasmuch as they were to share in the £100,000, the difference between the price he was to give and that which he was to receive for the estate; but does that make them proper parties to this suit? They undoubtedly would not have been proper parties to a bill for specific performance of the contract, either by the vendor or the purchaser, it being clearly settled that to such a bill the parties to the contract are the only proper parties. Mr. *Glasse*, on the part of *Wilkinson*, on this subject relied upon the well-known case of *Tasker* v. *Small* (1). That was a case in which, to a bill for specific performance, the mortgagees of the estate were made parties, that is some other parties than the parties to the contract, and Lord *Cottenham* decided that they were improperly made parties, and therefore, as against them, the bill was dismissed with costs.

It was attempted, by the elaborate argument on the part of the Plaintiffs on this point, to shew that *Wickens*, and the three Defendants of whom I am speaking, by being jointly interested in the performance of the contract had become partners in it, and that, having as between themselves entered into a sort of partnership, they were bound by the obligations of partnership, and were consequently liable to third parties for each other's default in relation to the partnership undertaking, and were also liable to return to the Plaintiffs the money in question in this suit, as having been received by them for a consideration which had failed; but I am of opinion that the principle upon which one partner is responsible for the acts and deeds of another has no application to such a case as this, and it being perfectly clear that the contract could not have been enforced against these three Defendants, it necessarily follows, in my opinion, from the rule laid down by Lord *Cottenham* in *Tasker* v. *Small*, which has become the rule of the Court, that *Wilkinson*, *Sarl*, and *Sudlow* are not proper parties to this suit, and the bill must consequently, altogether independent of the merits, be dismissed as against them.

(1) 3 My & Cr. 63.

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The same principle applies to the Defendants *Folch* and *Bennet*, who only claim under contracts with the Defendant *Wickens* to be interested in the profit purchase-money of £100,000. They are brought here, I think unnecessarily, at the suggestion of *Wickens*, whether they were not necessary parties. It was for the Plaintiffs to decide for themselves whether they were or were not necessary parties. I am clearly of opinion that they are improper parties, and having been brought here the bill must also be dismissed as against them.

There remains, then, only the principal Defendant *Wickens*. Against him the demand is merely for money and the delivery of the bonds. If he had been the owner of the estate, if he still had the *Aberaman* estate, it is clear that every payment on account of the purchase-money would have made the purchaser *pro tanto* the owner of the estate, and the contract having been abandoned on the ground of want of title in the vendor, that is in this case the want of quantity, assuming it to be rightly abandoned, the purchaser would have had a lien on the estate for the payments so made, and to enforce that lien a bill would have been sustainable, and would indeed have been the only proper remedy. This is established by the authorities relied upon by the Plaintiffs' counsel, *Wythes* v. *Lee* (1), and *Rose* v. *Watson* (2); but in this case the Defendant *Wickens* had no interest whatever in the *Aberaman* estate when the bill was filed, and there is consequently nothing upon which the Plaintiffs can have a lien. So far, therefore, as concerns the money sought to be recovered, the demand resolves itself simply into a mere demand for the repayment of money paid for a consideration which has failed, which is the proper subject of an action of assumpsit, but has never been held to be the proper subject of a bill in equity.

A very ingenious suggestion was made by Sir *Roundell Palmer* in order to get out of this difficulty, namely, that the company might be considered as having a lien upon the money which they had paid, that is, the company having a contract with *Wickens* and paying him money, and he in his turn paying it to Mr. *Bailey*, between whom and the company there was no contract or privity whatever, Sir *Roundell Palmer* suggested that the company might

(1) 3 Drew. 396. 2 Jur NS 7.

(2) 10 H. L. C. 672, 10 Jur NS 297.

be considered as having a lien upon the money. But if you have a lien upon a thing, you must be able to put your hand upon it; if it is a lien upon land you know where to find it; if it is a lien upon goods in your possession, or on title deeds in your possession, you know where to find them, but as to having a lien upon money paid by one man to another, the suggestion is very ingenious, but in my opinion wholly unfounded. I can therefore recognise no right in the Plaintiffs to a lien upon anything whatever.

Now, this subject of the right to recover a deposit (and whether it be that which is called in the strict sense of the word a deposit, that is, money paid to an auctioneer or to a vendor, when a contract is entered into, or whether it is a deposit *plus* another instalment of the purchase-money, it all rests on the same principle)—the question whether this could be the proper subject of a bill in equity is not new; it has been discussed over and over again, and the conclusions upon it have always been the same. Lord *St. Leonards,* in his Treatise on Vendors and Purchasers (1), to which we are all in the habit of referring on such subjects, after pointing out that where a vendor files a bill for specific performance and fails on account of want of title, he is considered as submitting the whole case to the jurisdiction of the Court, and therefore if the Court cannot compel performance it will make him return the deposit, says: "A purchaser has no right to elect to put an end to the agreement by forfeiting the deposit, and although the deposit be forfeited at law, yet equity will in general relieve the purchaser upon his putting the vendor in the same situation as he would have been in had the contract been performed at the time agreed upon, but if a bill by a purchaser for a specific performance is dismissed, the Court cannot order the deposit to be returned, as that would be decreeing relief: although a refusal of the seller may influence the costs." [His Honour then referred to the cases of *Bennet College* v. *Carey* (2); *Kendall* v. *Beckett* (3); *Williams* v. *Edwards* (4); *Gee* v. *Pearse* (5); and *Ewing* v. *Osbaldiston* (6); as authorities against the jurisdiction of a Court of equity to order the deposit to be returned, and continued:—] There is one other case, and one only, that I desire to mention, but it is an authority upon the subject of a most distinct character, the case of *Sainsbury* v. *Jones* (1). That was a case in which a person had entered into a contract to sell an estate on behalf of two others; it turned out that he had no authority, one of them was a lunatic and could not bind himself; the bill was dismissed with costs by the Master of the Rolls, upon the ground that the agent had no authority. Against the dismissal, as against the agent, an appeal was made to Lord *Cottenham*, and he had to decide whether, the relief as to specific performance having failed, he could order the deposit to be returned. Now, the judgment is so important that I must refer to the principal part of it. He says (2): "The contract in this case was entered into and signed by *Chitty*, but professedly and in terms as agent for *Jones* and *Doggerell*, the owners of the house which the Plaintiff agreed to purchase, and the bill alleges that the £20 deposit was paid to *Chitty* as such agent as aforesaid; the bill was dismissed at the Rolls and the Plaintiff acquiesces in the decree so far as it dismissed the bill against *Jones* and *Doggerell*, the owners of the house, but insists that there ought to have been a decree against *Chitty*, who was made Defendant by amendment, and the case made against him was, that if, by reason of the lunacy of *Jones*, *Chitty* had not authority to enter into the contract, then he in so doing had practised a fraud upon the Plaintiff, and it prayed in the alternative that if the Plaintiff should not be able to obtain specific performance, *Chitty* might return the deposit and reimburse the Plaintiff all the costs and charges which he had incurred in endeavouring to enforce the contract. The owners of the property not being parties to the appeal, and all title to a specific performance being abandoned, the case is just as it would have been if originally the Plaintiff had filed a bill against *Chitty* alone, stating that he could not enforce a specific performance, and praying a return of the deposit and compensation for the expense incurred under the contract against *Chitty*." That is precisely as it is here; no relief can be obtained, the estate is gone, and there is no lien upon it for the same reason. The only remedy is to get the money back, which is what was sought in this case. Lord *Cottenham* goes on to say,

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(1) 14th Ed. p. 55. /13th l 444.
(2) 3 Bro. C. C. 390.
(3) 2 Russ. & My. 88.
(4) 2 Sim. 78.
(5) 2 De G. & Sm. 325.
(6) 2 My. & Cr. 53.

(1) 5 My. & Cr. 1.

(2) 5 My. & Cr. 2.

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"That this relief, if the Plaintiffs can make out a proper case for it, might have been had at law is not disputed. The two cases of *Bratt* v. *Ellis* and *Jones* v. *Dyke* (1), are directly in point; but it is argued that this Court has concurrent jurisdiction. Now, the claim is for a return of the deposit paid to *Chitty*, as agent for *Jones* and *Doggerell*, and for damages for the injury sustained by the Plaintiff from the Defendant having entered into a contract of which the Plaintiff cannot obtain a specific performance. I certainly recollect the time at which there was a floating idea in the profession that this Court might award compensation for the injury sustained by the non-performance of a contract in the event of the primary relief for a specific performance failing, and I have formerly seen bills praying such relief; but that arises from my having known the profession sufficiently long to recollect the time when the decision of Lord *Kenyon* in *Denton* v. *Stewart* (2) had not been formally overruled. But at that time very little weight was attached to it, and very few instances occurred in which Plaintiffs were advised to ask any such relief; and for a short time Sir *W. Grant's* decree in *Greenaway* v. *Adams* (3) added something to the authority of *Denton* v. *Stewart*, although he threw out strong doubts as to the principle of that case. This, however, lasted but a short time, for *Greenaway* v. *Adams* occurring in 1806, Lord *Eldon*, in 1810, in *Todd* v. *Gee* (4), expressly overruled *Denton* v. *Stewart*, and from that time there has not, I believe, been any doubt upon the subject. Certainly, during the thirty years which have elapsed since that time, I have never supposed the granting any such relief as being within the jurisdiction of this Court; indeed before that case Sir *W. Grant*, in 1807, in *Gwillim* v. *Stone* (5), refused to follow his own decision in *Greenaway* v. *Adams*, because the Plaintiff did not ask a specific performance; that is in a case precisely the same as the present, for upon this appeal the Plaintiff does not ask a specific performance. Had it been supposed that this Court had the jurisdiction contended for, every bill for a specific performance would have prayed compensation in the event of the vendor proving

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(1) Lord *St. Leonards*, V. & P. 14th Ed. pp. 812, 813.

(2) 17 Ves. 276, n.

(3) 12 Ves. 395.

(4) 17 Ibid. 273.

(5) 14 Ibid. 128.

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not to have a good title. It is true that in this case the compensation sought is not against the vendor, but against a person who falsely assumed authority to sell, but this places the case still wider from the principle upon which this Court exercises its jurisdiction in cases of contract, because as against such agent there is no case of contract, but a mere claim for compensation for damages, arisen from there being none which the purchaser can enforce. As to the £20 deposit, if the suit cannot be maintained upon other grounds, it certainly cannot be supported in merely seeking a return of that small sum." (Lord *Cottenham* speaks of the sum being small, but it is quite evident that it did not turn upon the smallness of the sum), " That also is a claim at law: In *Williams* v. *Edwards* (1) and *Kendall* v. *Beckett* (2), this Court refused to grant such relief. In this case, however, the question does not arise, because the agreement and the bill state that the deposit was paid to *Chitty* on account of *Jones* and *Doggerell*, and no person is now before the Court representing their interest. It is unfortunate if in prosecuting this claim in this Court the Plaintiff has lost his remedy at law, but that cannot affect the decision of this case, and I cannot but observe that so early at least as December, 1834, the Plaintiff had full information of the facts of the case, for at that time he filed his supplemental bill against the committees of *Jones*, he then knew that he could not compel a specific performance of the contract, and having sought compensation for damages in a Court which had not jurisdiction to award them, I think the decree of the Master of the Rolls dismissing the bill with costs as against *Chitty* was correct, and I am under the necessity of now adding to such costs the costs of the appeal." Therefore, although *Chitty* had the deposit in hand, the want of jurisdiction in the Court was so clear that the bill was dismissed with costs as against him. So far, therefore, as this bill asks the return of the money paid by the company to the Defendant *Wickens*, I am bound by the authorities to decide that it fails.

11 Eq 485

Then, as to that part of the relief which seeks to restrain the Defendant from parting with the bonds, it was wholly unnecessary to come into this Court for that purpose, because the bonds were mere choses in action, and being mere choses in action, no trans-

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(1) 2 Sim. 78.

(2) 2 Russ. & My. 88.

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feree of them could acquire a greater right against the company than the transferor had. This was decided—indeed, it is a clear and settled principle, and scarcely requires decision—in *Pinkett* v. *Wright* (1), and *Athenæum Life Assurance Society* v. *Pooley* (2); and in the very first decision of the present Lord Chancellor, *In re Natal Investment Company* (3). The present case is much stronger, because the order to wind up the company having been made before the bill was filed, no proceedings could be taken to recover upon the bonds without the leave of the Court, and it is quite clear that the Court would never have given leave to take proceedings to recover any further part of the purchase-money under a contract which had been rescinded by the consent of all parties to it. It was therefore wholly unnecessary to file a bill for this part of the relief sought, and here, therefore, the bill fails also.

There only remains the prayer that the contract may be declared void, but as it had been finally rescinded by mutual consent several weeks before the bill was filed, it was wholly unnecessary to come into this Court for that declaration. The thing was gone, nobody suggested that it had any existence; to come here therefore with an expensive litigation to have that declared void which, by the mutual consent of all parties, was put an end to and done with, was the purest waste of time and money. On that ground also this bill fails. I am therefore of opinion that this bill fails on every part, and that it must be dismissed as against all parties.

The conduct of all the parties in these transactions has, in my opinion, been so devoid of merits, that I should probably have dismissed the bill without costs if the case had been one in its nature sustainable in this Court, but as I am of opinion that this is a mere attempt to try an action of *assumpsit* in this Court, I have no alternative, upon the settled principles of the Court, but to dismiss the bill with costs as against all parties.

I am sorry to be obliged to come to this conclusion, because I feel that it in no way meets the justice of the case. I feel this so strongly, that having seen pretty plainly that this must be the result, and being extremely reluctant to come to such a conclusion, I was desirous to be perfectly satisfied by most careful argument that my views on this subject were correct, and I had the advantage of having the case elaborately re-argued upon this one point, whether the bill could be sustained or not, by Sir *Roundell Palmer* arguing for the Plaintiff, and Mr. *Karslake* for *Wickens*, Mr. *Glasse*, who represented *Wilkinson*, declining to add to his former argument. The result, therefore, is, that I am, upon the principles of the Court, bound to come to this conclusion. Sir *Roundell Palmer* suggested that if I entertained the bill it would be within my province to decide whether the whole or part of the purchase-money which had been paid should be returned; if I had seen my way to that I should certainly have been very glad to have done so, because I am perfectly certain that it is not just that *Wickens* should retain all this money. I am equally clear that it would be unjust that he should return it all; and if I had the power I should award to *Wickens*, I think, certainly not less than half the money he has received for compensation for the expenses he has incurred and the disappointment he has experienced in the non-fulfilment of the contract with this company, which I believe has miscarried in this undertaking solely from the want of straightforward and honest dealing on the part of those who were engaged in it. But I have no jurisdiction. I am unable to act as an arbitrator, and therefore I have no alternative but to adopt the course which I have said I am bound to take. There is one point which presses very much on my mind, which is, that the consequence of the dismissal of the bill is that *Wickens* will be able to take out of Court the £5000 which was deposited in consequence of Sir *William Page Wood's* order of September, 1865. The cause is so important that it will probably not stop here. Although I dismiss the bill, of course it will be without prejudice to the rights at law, and probably there will be an action at law against *Wickens* to recover the money he has received, and a cross action by him against the company for damage for the non-fulfilment of the contract. With regard to that £5000, I will direct that the decree shall not be drawn up for a month, so as to give the Plaintiffs time to consider whether they will appeal or not, and then if they desire to appeal I shall be prepared to accede to an application to stay the execution of

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(1) 2 Hare 120.

(2) 3 De G. & J. 294.

(3) Law Rep. 3 Ch. 355.

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the decree, so far as regards taking out the £5000, for a reasonable period.

Apr. 25. Mr. *Roxburgh*, Q.C., stated that the Plaintiffs had been advised to appeal, and asked that the fund in Court might not be dealt with pending the appeal.

THE VICE-CHANCELLOR ordered that upon the Plaintiffs undertaking to present an appeal within one month after decree passed and entered, the fund in Court be not paid out or otherwise dealt with until the hearing of the appeal or further order. Liberty to apply.

Solicitors for the Plaintiffs: Messrs. *Maynard, Son, & Co.*

Solicitors for the Defendants: Mr. *H. Wickens*; Messrs. *Wilkinson, Stevens, & Wilkinson*; Mr. *R. Davis*; Mr. *Vining*; Messrs. *Hillyer & Fenwick*.

In re LONDON INDIA RUBBER COMPANY.

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1867
Nov. 11.
1868
Jan. 29.

Preference Shareholders—Distribution of Assets upon Winding-up.

Upon the formation of a company for working certain patents, the A shareholders contributed all the capital, and the B shareholders received paid-up shares as a consideration for the patents and the premises on which they were worked. The A shareholders were to receive out of the profits the whole amount of their capital with interest at £7 10*s*. per cent. before the B shareholders could participate in the profits:—

Held, upon the winding-up of the company, no profits having been realized, that there being a provision only for preferential dividend, and no provision as to the division of capital upon breaking up, that the surplus assets must be distributed between both classes of shareholders *pro râta*, without reference to their rights in respect of dividend.

6 Eq 146
20 Eq 61
— 559
5 ChD 8
6 ChD 51

THE *London India Rubber Company* was formed in the year 1860, for working certain patents for the manufacture of waste vulcanized India rubber.

An agreement for the formation of the company was entered into on the 15th of August, 1860, between the patentees of the one part, and persons representing the intended company of the other part, whereby it was provided that the capital should be

£75,000, divided into 7500 shares of £10 each; 5000 of which were to be preference or A shares, and the remainder to be ordinary or B shares. *Nathaniel Dodge* and *H. Hall,* the patentees, were to assign the patents and the premises on which the works were erected to the company, receiving as a consideration for such assignment 2600 B shares fully paid up.

By the fifth clause of the articles of association it was provided that when and so soon as the holders of the A shares should have received out of the profits of the company (after setting aside the reserve fund thereinafter mentioned) a sum of money amounting in the whole to the total capital which had been paid up on their shares, together with £7 10*s.* per cent. per annum by way of dividend or interest upon such capital for the time such capital should have been paid up, the A and B shares should be amalgamated, and the holders thereof should thenceforth be entitled to participate equally in the profits of the company, and all distinction between the shares should cease.

By the 161st clause the directors were authorized, with the previous sanction of an ordinary or special general meeting, to declare a dividend to be paid to the shareholders, and also to declare a bonus or premium, to be paid to the several shareholders in proportion to the amount of shares held by them respectively, in respect of any moneys which might have been realized by the sale of any of the patent rights of the company, or by granting any licences for the use thereof in consideration of any premium or present sum of money, or by the sale of any surplus or other lands, works, machinery, or other property not required by the company.

It was also provided, that no dividend should at any time be paid except out of the profits of the company; and no bonus or premium should be paid or divided except out of moneys resulting from such licences, or the sale, as aforesaid, of property not required by the company. That if the capital of the company should be at any time increased, the B shareholders were to contribute to the new capital by taking shares therein, upon which shares they were to pay the same proportionate amount as the holders of A shares; and in respect of such new capital the B shareholders were to be entitled equally with the A shareholders, or with any other persons who might contribute towards such new capital; and to the extent of such shares to vote at general meetings, and in all respects to act as the holders of A shares in relation to the affairs of the company; and in case the B shareholders should refuse to accept shares in such new capital, the B shares held by the shareholder so refusing should be forfeited to the company. That until the A and B shares were amalgamated, the B shareholders should have no right to vote at any general meeting, except as to any increased capital.

That the directors should set aside a certain amount of the profits to form a surplus or reserve fund, to be applied for equalizing dividends, or extending or improving their patents and other property, and generally for meeting contingencies; and such surplus or reserve fund was to be invested in manner therein mentioned. And further, that the holders of B shares should not be entitled to, or be paid, any dividend or bonus thereon respectively until the holders of A shares should have received out of the profits of the company, by way of dividend on the shares held by them respectively, a sum of £7 10*s.* per cent. per annum upon the amount paid up upon the A shares; but subject to this restriction, the holders of B shares should be entitled to receive the dividends and bonuses to accrue on all or any of the said shares on equal terms with the holders of A shares.

The patents were assigned in accordance with the terms of the agreement, and a sum of £35,000 was paid up upon shares held by the A shareholders. The inventions were worked by the company up to the time of its liquidation at a considerable loss, and no dividends were ever declared by the directors.

An order had been obtained for winding up the company by the Court, and a sum of about £3000, produced by the realization of the land and property of the company (other than its patent rights) was all that was now available for division among the shareholders, and was claimed exclusively by the A shareholders, who alleged that the B shareholders were entitled to nothing until the A shareholders had first received the whole amount paid up upon their shares, together with dividends or interest at the rate of £7 10*s.* per cent. per annum thereon; while, on the other hand, the B shareholders claimed to par-

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ticipate proportionally in the fund, on the ground that the preference extended to the division of profits only, and not to the assets of the company.

The question came on for argument upon an adjourned summons, on the 11th of November.

The Vice-Chancellor then expressed an opinion that the A and B shareholders were entitled to participate equally in the division of this fund. He observed that the basis of the company was, that the patentees and those who were connected with them were to bring into the common stock the patents and the leasehold premises on which they were worked, and that the A shareholders, who were shareholders in the ordinary sense of the word, were to bring in the money. Then the patentees and owners of the premises agreed to be paid in shares; and they shewed their confidence in the undertaking by agreeing that their shares, designated as the B shares, should receive no dividend until the A shareholders should have received a preferential dividend of £7 10*s*. per cent. out of the profits, and that after payment of such preferential dividend, then the A and B shares were to be amalgamated or placed upon an equality. It turned out that the whole capital provided by the A shareholders had been lost, with the exception of £3000 realized by the sale of the stock, &c.; and it appeared to be but justice that the A shareholders, who found the money, should receive back what remained of the £35,000 when the concern came to an end. But the terms of the contract applied only to a preferential dividend, and there was no provision applicable to the capital of the company in the event of dissolution. The case was unprovided for, and the money must therefore be divided equally amongst both classes of shareholders.

After expressing the above opinion, His Honour said, upon a subsequent day, that the question appeared to him of so much consequence that he should desire to have the case re-argued before him, which was consequently done on the 29th of January.

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Jan. 29. Mr. *Locock Webb*, for the A shareholders:—

It was evidently the intention that the preference given to the A shares by the fifth clause of the articles of association should extend to capital as well as dividend. The repayment of capital to

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the persons who had advanced the money is the essential object together with a dividend at £7 10s. per cent. upon that capital. The B shareholders, in fact, paid nothing. They had no capital, and there can be no justice in giving them a portion of the capital belonging to the A shareholders. It is true there are no clauses providing for a dissolution and winding-up; but this clause is just as applicable to a distribution of assets after winding-up as to a division of the profits. The case of *Henry* v. *Great Northern Railway Company* (1), decided that preference shareholders were entitled to receive the full amount of their dividends due upon former half-years as well as the current half-year, before any payment could be made in respect of dividends on the ordinary stock. In that case a sum of money was raised under an Act of Parliament in order to pay off certain fictitious stock which had been fraudulently issued, and the surplus was to be apportioned between the shareholders according to their priority. The principle of that case is equally applicable to this, and in *Corry* v. *Londonderry and Enniskillen Railway Company* (2) it was held that preference shareholders were entitled to arrears of dividends out of future profits, and that such right must prevail against shareholders over whom they have been preferred. So also in *Sturge* v. *Eastern Union Railway Company* (3) preference shareholders were held to be entitled to payment out of money that had been borrowed, on the ground that they were a guaranteed class, and had preferential rights beyond the mere payment of dividend. In this case the A shareholders have preferential rights of the most substantial kind, since they were the sole contributors of the money, part of which is now to be distributed. By the 161st clause of the articles of association it is provided that a bonus or premium is to be paid to the shareholders in respect of any money to be realized by the sale of lands or other property not required by the company. Now, the surplus assets to be distributed under this winding-up have been produced by the sale of the property of the company, and therefore the A shareholders are as much entitled to that as to any dividend to be declared.

(1) 1 De G. & J. 606. 3 Jur. N.S. 1133 (2) 29 Beav. 263. 7 Jur. N.S. 508
(3) 7 D. M. & G. 158. 1 Jur. N.S. 713

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Mr. *Westlake*, for the B shareholders :—

The ordinary definition of a preference shareholder is a shareholder entitled merely to a preferential dividend, but with no preference as to the capital. The preference shareholders are equally shareholders with the other members of the company. The clauses in the deed of association refer only to a preferential dividend, and there is no provision as to the capital. The B shares are to be treated as if £10 per share had been paid up, and for this consideration the company have had the benefit of the patents and the premises on which they were worked. Suppose that any of the B shares had been forfeited under the clause to that effect in the deed, and had been re-issued and sold in the market to other persons, it could not be contended that subsequent purchasers who, upon a re-issue, should pay up the calls would have no right to participate in the capital. The provisions of the deed, by the use of the words dividends and bonuses, shew clearly what was intended; and it is evident that in all but dividends and bonuses the B shareholders were to rank exactly like the rest of the shareholders. The B shareholders have quite as much right to a share of this fund as the A shareholders, in respect of the patents and leasehold premises, which represent a certain amount of paid-up capital. There is no provision in these articles for a dissolution; they apply only to a going concern, and the preference shareholders can only claim such preference as may be expressly provided by the articles, and in this case the payment to preference shareholders is distinctly limited to the profits of the concern. In the absence of express authority upon this question an interpretation may be obtained from the language of the Legislature in the *Railways Abandonment Act* (13 &14 Vict. c. 83), where, in sect. 29, it is provided, that the company upon winding up their affairs shall distribute any surplus from the sale of lands, &c., among the shareholders in proportion to their shares and interests therein; there being no reference to preferential claims.

Mr. *Davenport*, for the official liquidator.

Mr. *Locock Webb*, in reply :—

The *Railways Abandonment Act* is more in favour of the prefer-

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ence shareholders, since, by the 28th section, it is provided that nothing therein contained shall authorize the company to reduce or interfere with any amount of capital paid up before a specified date, and entitled to any preferential or guaranteed dividend or interest. That section would, consequently, restrict the operation of the 29th section as to the distribution of surplus. It may also be mentioned, that in a case of *The Sheffield and Manchester Railway Company* before Vice-Chancellor *Wood*, His Honour granted an injunction to restrain a meeting from treating the preference shareholders as ordinary shareholders.

SIR R. MALINS, V.C. :—

This case came before me in November last, and I gave judgment at the close of the argument; but, upon its being intimated to me afterwards that there was probably more in the case than my attention had been drawn to, involving, as it does, a point of very general importance, I thought it better that the matter should be spoken to again before the order was passed; and accordingly I requested the Registrar not to pass the order until counsel had had an opportunity of discussing the point again. It has now been very fully re-argued, and I am sorry to say that I am obliged to adhere to the opinion which I expressed upon the former occasion. I am "sorry" because, having regard to the original position of the A and B shareholders, I think the justice of the case would be best met by saying, that upon the dissolution of this insolvent concern the whole surplus should go back to those who found the money, rather than to those who allured them into the adventure. I cannot, however, decide the case upon any abstract notion of justice, but only according to the contract which the parties have entered into, and their rights arising out of that contract. The event which has happened, of the company breaking up and its property being all sold, is a contingency which was wholly omitted both from the preliminary contract and the articles of association. The case, therefore, of any surplus capital remaining to be divided is not provided for: the only stipulation is, that the A shareholders shall have a preferential dividend. But no dividend has

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ever been declared, and the company has never made any profits. When a dividend is declared it becomes a debt from the company; but until that time the dividend is only a thing that may possibly come into existence. My attention has now been drawn to some authorities which were not before cited. Besides the case of *Henry* v. *Great Northern Railway Company* (1), which was previously mentioned, *Sturge* v. *Eastern Union Railway Company* (2), and *Corry* v. *Londonderry Railway Company* (3), have been now cited for the first time; but none of these cases go beyond the right to dividend. They all rest upon this principle, that when a dividend is declared those who hold shares entitled to a preferential dividend must have all their share of preferential dividend paid before the holders of ordinary stock can get any dividend whatever. The cases do not go beyond that. Then, with regard to the *Railways Abandonment Act*, which has been relied upon, that leaves the matter very much where it was before, except that the Legislature, knowing that there were preferential shares in existence, as is shewn by the 28th section, makes no provision with regard to their rights by the 29th section, but simply says that the surplus money shall be distributed amongst the shareholders according to their shares and interest. None of the authorities go beyond the right to dividend, leaving the right to capital altogether unprovided for. The 161st clause of the articles of association was particularly relied upon by Mr. *Locock Webb*, as shewing that a dividend or bonus may be partly paid out of money produced by the sale of property not required by the company, and therefore, as it was argued, out of the proceeds of the property of the company when it is wholly converted. But I think it is plain that the 161st clause, is directed to a going or continuing concern. It does not in the slightest degree contemplate a breaking up of the company, and is not intended to define the rights of the parties on the happening of that unfortunate event. This clause, therefore, has no application to the event which has happened. The fund is not dividend, it represents the capital of the company, and, not being otherwise provided for, it must, in my opinion, as I originally decided, be divided amongst the shareholders of the company *pro*

(1) 1 De G. & J. 606. 3 Jur N S 1133. (2) 7 D. M. & G. 158 1 Jur N S 7
(3) 29 Beav. 263. 7 Jur N S 508

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râta, according to the amount of capital which each shareholder has in the concern; in other words, amongst the two classes of shareholders equally. I wish it to be considered that I decide the case upon this principle: that where there is a provision for preferential dividend, but no provision for the division of capital, upon the breaking up of the concern any surplus must be distributed amongst the shareholders according to their capital, without reference to their rights in respect of dividend. The order will be dated as of to-day, and the costs will come out of the fund.

Solicitor for the A Shareholders: Mr. *J. Johnson.*

Solicitors for the B Shareholders: Messrs. *Linklaters, Hackwood, & Addison.*

Solicitors for the Official Liquidators: Messrs. *Sole, Turner, & Turner.*

McMURRAY *v.* SPICER.

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Jan. 13, 14, 15, 17.

Vendor and Purchaser — Specific Performance — Ambiguity in Description — Parol Evidence—Statute of Frauds—Laches—Notice to Rescind—Trustee Act, 13 & 14 *Vict. c.* 60, *ss.* 9, 10—*Limited Title—Costs.*

In November, 1861, *S.* agreed to purchase from the Plaintiff "the mill property, including cottages in *Esher* village—all the property to be freehold," and verbally agreed to take a limited title. The property was identified by parol evidence. Negotiations were carried on as to the title till June, 1863, when it was accepted subject to certain requisitions, of which the principal was this:—Part of the property was copyhold, and had been devised by a testator to one of his daughters in fee. After his death the two daughters of the testator, being co-heiresses, were admitted as tenants in common, and when the Plaintiff enfranchised the copyhold the conveyance was made to the two daughters, their heirs and assigns. The daughter not beneficially interested refused to convey the legal estate, and an order was obtained from the Court vesting the legal estate, under the 9th section of the *Trustee Act*, in trustees for the other daughter. The purchaser objected that the order should have been made under the 10th section of that Act, and upon this objection negotiations went on till December, 1864, when the purchaser gave notice that unless within one week the vendor would agree to comply with the requisitions, he should require a good marketable title to the whole property, and if that were not shewn within five weeks the contract would be treated as rescinded:—

Held, upon bill for specific performance, filed in August, 1865, that the

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10 Eq. 284, 7,
17 Eq. 310
4 Ch. D. 244.
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contract was not void for ambiguity, parol evidence being admissible for identification; that it was not void for delay, which could only be computed from the termination of negotiations till the filing of the bill; that the purchaser having agreed to accept a limited title, and the negotiations having gone on upon that footing, a complete title could not be demanded; that the time limited by the notice to rescind was not reasonable; and that the vesting order was properly made under the 9th section of the *Trustee Act*.

Decree for specific performance, limiting the inquiries as to title to the objections specified in June, 1863. Costs up to the hearing to be paid by the purchaser.

THIS was a bill filed by *William McMurray* against *John William Yorick Spicer*, for the specific performance of a contract entered into by the Plaintiff with *John William Spicer* (deceased), the father of the Defendant, for the purchase of certain property in the parish of *Esher*. The bill stated that at the time of the agreement the Plaintiff was seised in fee simple in possession of six freehold cottages, and was also entitled for an equitable estate in fee to a messuage and certain pieces of land adjoining, partly of freehold and partly of copyhold tenure, situate in the parishes of *Esher* and *Walton-on-Thames*, upon part of which premises there had been lately standing certain paper mills occupied by the Plaintiff, which had been burnt down, and which the Plaintiff contemplated rebuilding. The Plaintiff was entitled in equity to the last-mentioned premises under an agreement entered into by him with Lord *Hotham* and Lady *Berkeley* for the purchase thereof. In the course of the negotiations for the purchase the Plaintiff informed *J. W. Spicer* that he had entered into an agreement with Lord *Hotham* and Lady *Berkeley* for the purchase of the secondly-mentioned premises, but that the abstract of their title had not then been delivered, and *J. W. Spicer* thereupon stated to the Plaintiff, that if he would cause the copyhold premises to be enfranchised he would be satisfied with such title as Lord *Hotham* and Lady *Berkeley* were bound to make to the Plaintiff under his agreement with them, and should be contained in the deed enfranchising the copyholds. By the written memorandum of the above agreement, dated in November, 1861, *J. W. Spicer* agreed "to purchase the mill property, including cottages in *Esher* village, for £11,000, all property in *Esher* parish at the time of purchase to be freehold." In pursuance of this agreement the Plaintiff entered into negotiations for the enfranchisement of the copyhold portion of the premises comprised in the agreement, and a deed was executed in January, 1862, by which, in consideration of £1200, the Commissioners of Woods and Forests (to whom the management of the manor of *Esher* had been assigned on behalf of Her Majesty and the King of the Belgians) granted and conveyed all the estate of her Majesty and the King of the Belgians in such copyhold premises to Lady *Berkeley*, the Baroness *di Troiesé*, and Lord *Hotham*, their heirs and assigns for ever. The said Baroness *di Troiesé* was made a party to this indenture of enfranchisement in consequence of the legal estate in a moiety of a moiety of the premises being vested in her as trustee for her sister, Lady *Berkeley*, under the following circumstances:—One moiety of the copyhold property was in Lord *Hotham*; the other moiety was devised by the will of Sir *T. Sutton*, dated in 1805, to his eldest daughter, afterwards Lady *Berkeley* in fee. The testator died in 1813, without having surrendered the copyholds to the uses of his will, leaving his two daughters, Lady *Berkeley* and the Baroness *di Troiesé*, his co-heiresses at law. The two sisters were subsequently admitted to the copyhold premises, as tenants in common.

J. W. Spicer died in August, 1862, and the Defendant was his sole legal personal representative, and the sole devisee and trustee of his will.

From this period negotiations were carried on between the solicitors for the Plaintiff and Defendant relative to the title, until, on the 14th of June, 1863, the Defendant's solicitors sent to the Plaintiff's solicitors an opinion given by their counsel, whereby the requisitions upon the title were reduced to certain specified requisitions, the most material of which related to the getting in of the legal estate vested in the Baroness *di Troiesé*, and, subject thereto, the title was accepted.

In the meantime, during the year 1862, the solicitors for Lady *Berkeley* had had divers communications with the Baroness *di Troiesé*, who was resident at *Naples*, in the course of which the Baroness refused to convey the legal estate, and a Petition was consequently presented under the *Trustee Act*, and an order was made by the Court on the 12th of June, 1863, declaring that the

Baroness *di Troiesé* must be deemed to be a trustee within the meaning of the Act. And an order was made, under the 9th section, that the legal estate vested in her should vest in two persons therein named as trustees for Lady *Berkeley*.

The Plaintiff's solicitors subsequently wrote to the Defendant's solicitors, and agreed to comply with all their requisitions, and as to the getting in of the legal estate, they forwarded a copy of the vesting order so made by the Court. In answer to this, the Defendant's solicitors objected that the vesting order was inoperative, and that the legal estate ought to have been vested under the 10th section of the *Trustee Act*, and that, consequently, a new vesting order ought to be obtained. This requisition the Plaintiff was unable to comply with, since the solicitors for Lady *Berkeley* refused to present another Petition to the Court, and insisted that the previous vesting order was perfectly valid and effectual. The Defendant's solicitors still declined to complete the purchase, unless a new vesting order was obtained, and on the 12th of December, 1864, they sent a communication to the Plaintiff's solicitors to the effect "that unless the Plaintiff within one week complied, or consented to comply, with all their requisitions, the Defendant would insist on a good and marketable title being shewn and made out to the whole of the property; and unless such good and marketable title were shewn and made out within one month from the 19th of December, 1864, the Defendant would treat the sale and purchase as at an end."

After the 21st of December, 1864, considerable further correspondence took place between the solicitors on both sides relative to the completion of the title, but the Defendant still refused to complete the purchase, and the present bill for specific performance was filed on the 12th of August, 1865.

The Defendant, by his answer, denied that there was any understanding at the time the contract was entered into that the purchaser was to be satisfied with such title as the Plaintiff's vendors were bound to make to the Plaintiff under his agreement with them. The Defendant insisted that the Petition of Lady *Berkeley* and her trustees would not authorize a vesting order being made under the *Trustee Act*, 1850, s. 9, as that section related to a trustee solely seised. The 10th section related to a trustee seised jointly with others, and authorized an order vesting the property in the other persons so jointly seised, either alone or together with others, and as the Baroness *di Troiesé* was jointly seised under the enfranchisement deed, these sections would not authorize an order vesting her estate in strangers.

Sir *Roundell Palmer*, Q.C., Mr. *Charles Hall*, and Mr. *W. Pearson*, for the Plaintiff:—

The first objection which the Defendant raises to the completion of his contract is, that the property is not sufficiently described. Now, the contract is " for the purchase of the mill property, including cottages in *Esher* village, for £11,000." We submit that there is nothing vague in this description. The cases of *Ogilvie* v. *Foljambe* (1), *Owen* v. *Thomas* (2), and other cases collected in Lord *St. Leonards*' Vendors and Purchasers (3), and in *Dart's* treatise on the same subject (4), are sufficient to shew that a purchaser cannot escape from his contract on such an objection. Besides which, during the whole of the correspondence between the parties there was no question as to the identity of the property, and it is too late now to raise the objection. Then there has been part performance of the contract on the part of *McMurray*, who has paid £1200 for the enfranchisement of the copyholds in pursuance of the contract, and with the full knowledge of the Defendant and his legal advisers

Upon the question of delay, the time cannot be computed until after the notice from the Defendant to rescind the contract, for up to that period there was an admission by the Defendant that the contract was in existence, otherwise there would be nothing to rescind. It was held in *Southcomb* v. *Bishop of Exeter* (5) that the interval during which the parties were negotiating could not be included in the time, in raising a question of laches, and in this case the Plaintiff, from the first, was endeavouring to remove the objections to the title, and to render litigation unnecessary. After the notice to rescind, which was dated the 12th of December, 1864, there were still further negotiations, in which the Plaintiff

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(1) 3 Mer. 53.

(2) 3 My. & K. 353.

(3) 14th Ed. p. 345. 13th Ed 308

(4) Page 140.

(5) 6 Hare, 213.

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endeavoured to induce the Defendant to complete, and the bill was filed in August, 1865, which could not be considered an unreasonable time.

Then we say that there was no valid notice to rescind, and that the time given us to remove the objections was not sufficient. The notice required that unless within one week we consented to comply with all the requisitions, the Defendant would insist upon a marketable title being shewn to the whole of the property, and unless such marketable title were shewn within one month from that time the Defendant would treat the sale and purchase as at an end. Now, the Defendant had no right to insist upon a marketable title to the whole property when he knew that the contract was for a limited title only. But further than this, the negotiations had been going on, and the requisitions made, upon the footing of this view of the agreement. We say that, up to the date of the last opinion of counsel, all the requisitions had been complied with in substance except one, and if the Court should be of opinion that no objection can be raised upon that point, then the notice to rescind must fail, and the Defendant must be decreed to perform the contract. The only real difficulty which the Defendant raised was as to the vesting of the legal estate under the *Trustee Act*. We submit that the order was properly made under the 9th section, as the Baroness was the only person seised upon any trust. Lady *Berkeley* was beneficially entitled, and was, therefore, not a person jointly seised upon a trust, and consequently it was not a case which came under the 10th section of the *Trustee Act*, as the Defendant contends. We also submit that the time specified in the notice to rescind was not reasonable, and this view was taken by the Court in the cases of *Parkin* v. *Thorold* (1), *Wells* v. *Maxwell* (2), and *Taylor* v. *Brown* (3).

Mr. *Jessel*, Q.C., and Mr. *Smart*, for the Defendant:—

The decree asked in this case is for specific performance of the contract, and that the Defendant shall not be required to answer any requisitions subsequent to the time when the last opinion of counsel was forwarded to the Plaintiff's solicitors. Such a limitation has never yet been made in a decree for specific performance. If there is any decree it must be a general reference as to title: *Lesturgeon* v. *Martin* (1). But we submit that the bill must be dismissed altogether, upon these grounds:—First, that the contract in writing is not in itself sufficiently definite to enable the Court to decree performance, and that parol evidence cannot be admitted to explain the meaning of a written contract where there is no description given; secondly, the delay which the Plaintiff has been guilty of throughout the negotiations; and thirdly, that we have given a valid notice to rescind upon certain terms which the Defendant has failed to comply with.

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(1) 16 Beav. 59.
(2) 32 Beav. 408, 550. 9 Jur N.S
(3) 2 Beav. 180.

Upon the first objection we say that the grammatical construction of the sentence is "the mill property (including the cottages in *Esher* parish)," then there is no description whatever except "the mill property." Now part of the property so described is some distance from the mill, and part of it is not even in the parish of *Esher*, but in the adjoining parish of *Walton*. In this description there is a patent ambiguity, and parol evidence cannot be admitted to correct so vague a description.

On the second point, the evidence shews that the Plaintiff was guilty of repeated delays from the commencement of the negotiations, and although each individual act of laches might not be sufficient to upset the contract, the combined acts of delay bring the case within the authority of *Milward* v. *Earl Thanet* (2), where Lord *Alvanley* observed that a party could not call upon a Court of equity for specific performance unless he has shewn himself ready, desirous, prompt, and eager; and in *Southcomb* v. *Bishop of Exeter* (3) it was held that the Court would not grant specific performance except where the Plaintiff had been prompt in seeking his equitable remedy.

Upon the third point, we say that we were justified in giving the notice to rescind. In the case of *Parkin* v. *Thorold* (4), the decree for specific performance was based chiefly upon the fact that the Defendant had waived his right to make time of the essence of the contract, and the Master of the Rolls said in that case that it

(1) 3 My. & K. 255.
(2) 5 Ves. 720, n.
(3) 6 Hare, 213.
(4) 16 Beav. 59.

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was undoubted law that either party might, by a proper notice, bind the other to complete within a reasonable time to be specified in such notice. In *Roberts* v. *Berry* (1) there were special reasons for specific performance being decreed, and there was no evidence to shew that any day had been specified which would make time of the essence of the contract. It appears also from the cases of *Wells* v. *Maxwell* (2), and *Nott* v. *Riccard* (3), that one party may at any time bind the other by fixing a day so as to make time of the essence of the contract. The time given by the Defendant in this case was not unreasonable, considering the period that had already elapsed. The Plaintiff had five weeks given him to complete his title.

Then, upon the subject of the title itself we say that there is no evidence, except that of the Plaintiff alone, that we were to take such limited title as the Plaintiff's vendors were bound to shew. The Defendant does not admit that statement, and he was himself cognisant of the whole negotiations for the purchase and signed the agreement as agent for his father. Whatever the original purchaser might have consented to do with a view to get possession of the Plaintiff's property, the Defendant is not now a willing purchaser, and stands upon his strict rights to rescind the contract.

The principal objection to the title is, that a wrong order was made upon the Petition under the *Trustee Act*. The two sisters were jointly seised of a moiety of this estate, and consequently this case comes within the 10th section of the Act, and not the 9th. In *Coke* upon *Littleton* (4) it is said "If a villaine descend to two co-parceners, this is an entire inheritance, although the profit may be divided." In *Burton* on Real Property (5) there is this explanation of the title of coparceners: "If there be no son all the daughters take the inheritance as coparceners, and are said to make but one heir." Coparcenary is intermediate in its nature between joint tenancy and tenancy in common. There is a unity of title but no benefit of survivorship." Coparceners are therefore "jointly seised," and this is further shewn by passages in Lord *St. Leonards*' Vendors and Purchasers (6). We say, also, that

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(1) 16 Beav. 31; 3 D., M. & G. 284.
(2) 32 Ibid. 408. 9 Jur. N.S. 965
(3) 22 Ibid. 307. 2 Jur. N.S. 1038
(4) Page 164 a.
(5) Page 112.
(6) 14th Ed. p. 349. 13th Ed 39

Lady *Berkeley* became jointly seised by the deed of enfranchisement of 1862. *Scriven* in his book on Copyholds (1), says there are two modes of enfranchisement, one by release of servitude, and the other by conveyance of the freehold. The effect of the latter mode depends upon the estate conveyed, and not upon the previous estate of the copyholder. In this case the enfranchisement was by conveyance to Lord *Hotham*, Lady *Berkeley*, and the Baroness *di Troiesé*, as joint tenants. This made them joint tenants of the freehold, which is consequently vested in them jointly.

Then we say that no objections were waived by the Defendant in consequence of a premature conditional acceptance of the title by the Defendant's counsel. This was distinctly decided in *Deverell* v. *Lord Bolton* (2), where Lord *Eldon* said (3), "Would it not be strange to compel a specific performance upon the mere ground that counsel had given an opinion which the Court may think wrong? . . . . It is too much to say that where an abstract is laid before counsel, who approves the title, his approbation is to be taken, as against a person consulting him, as a waiver of all reasonable objections. That would carry the doctrine of waiver to an extent of which I do not know an instance."

Mr. *C. Hall*, in reply.

Jan. 18. SIR R. MALINS, V.C.:—

The resistance to this contract is upon three grounds: First, that the property, by the terms of the contract, is so indefinitely described that the Court cannot act upon it; secondly, that there has been such delay that the Plaintiff has lost his right to a decree for specific performance; and thirdly, that an effectual notice to rescind the contract was given on the 12th of December, 1864, while the bill was not filed till the 12th of August, 1865, and in addition to those objections various arguments have been urged to shew that there is a clear defect in the title, such as to call upon me now to dismiss the bill, and not to make any reference whatever as to title.

(1) Page 544.

(2) 18 Ves. 505.

(3) 18 Ves. 514.

The bill is verified by the affidavit of Mr. *McMurray*, who states the circumstances which induced Mr. *Spicer*, the father, to enter into this contract, and he states that Mr. *Spicer* agreed to be satisfied with such title as *McMurray's* vendors, Lord *Hotham* and Lady *Berkeley*, were bound to give. Now the first objection is that the contract, which is for the sale of all the mill property, including cottages in *Esher*, does not contain such a description of the property as would enable the Court to perform the contract. But the evidence makes it sufficiently distinct. All that the *Statute of Frauds* requires is that there shall be a memorandum in writing of the bargain or contract entered into, signed by the parties to be charged therewith. Now the Courts have gone a great length in holding that a very general description of property is sufficient to enable it to perform a contract. The authorities are referred to in *Dart's* Vendors and Purchasers, and they are also collected by Lord *St. Leonards* in his Treatise on Vendors and Purchasers; and there are two very instructive cases upon the subject. The first is *Ogilvie* v. *Foljambe* (1). In that case it appears that Mr. *Ogilvie*, having a leasehold house in *Grosvenor Place*, had put it up for sale by auction. By the conditions of sale it was stipulated that he was not bound to produce the lessor's title. The property was not sold at the auction, and a correspondence afterwards took place, which finally resulted in an agreement by Mr. *Foljambe* to purchase Mr. *Ogilvie's* house. That was all. It did not state where the house was, nor did it state whether the house was freehold or leasehold. He agreed to give for Mr. *Ogilvie's* house £14,000, and that was held to be a good contract, because parol evidence was admissible to shew what house of Mr. *Ogilvie* was the subject of the contract. The other case is that of *Owen* v. *Thomas* (2). There a person having sold a house at *Chepstow* did not enter into any written contract, but wrote to his solicitor, "I have sold my house to Mr. *Thomas* for so much money; the deeds are in your hands." There was no written contract between the parties; but as the *Statute of Frauds* requires only a note or memorandum that a contract had been entered into, it was held by Sir *John Leach* (and it has always been regarded as a leading authority upon the subject) to be a sufficient memorandum within the *Statute of Frauds*. He said, "I have sold my house;" and the deeds were sufficient to shew what the house was, and parol evidence was admitted to explain the subject of the contract.

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(1) 3 Mer. 53.

(2) 3 My. & K. 353.

Upon the evidence, I consider that this property had acquired a reputation of being the mill property of *McMurray* in the parish of *Esher*, and is, in my opinion, well described in the contract by these terms.

But if there had been any ambiguity or difficulty upon the subject, all that is removed by the conduct of the parties, for there has been a correspondence; abstracts have been delivered; requisition upon requisition has been made upon this title, beginning in the year 1863, and continuing down to the end of 1864, and I do not find a syllable raising any question as to what property was meant, for all the parties knew perfectly well that it was the whole of the mill property, or the property connected with the mill, which *McMurray* had in the village of *Esher*. For these reasons I am of opinion that the first ground of objection to the performance of this contract wholly fails.

The next objection is as to the delay. Now, undoubtedly, from the time of the contract being entered into down to the filing of this bill, the delay is very considerable. The contract having been entered into in 1861, the bill was not filed till August, 1865, but during that time an active correspondence had been carried on till December, 1864, and, whatever the entire lapse of time may be, the interval while parties go on corresponding for the purpose of perfecting the title must be excluded from the computation. Upon principle, that is the conclusion I should arrive at if there had been no authority for it, but one of the authorities relied upon is conclusive upon the subject, and that is the case of *Southcomb* v. *Bishop of Exeter* (1), where precisely the same thing occurred, and Sir *J. Wigram* held that the interval during which the correspondence was carried on respecting the title ought not to be regarded on the question of laches, and if the Plaintiff had filed his bill quickly afterwards he would have had a decree, but the delay that took place from the termination of the correspondence before the bill was filed, precluded the vendors from sustaining their suit for specific performance.

(1) 6 Hare, 213.

In this case, upon the same principle, I exclude, for the purpose of considering delay, all the time down to the 12th of December, 1864.

It was argued that the notice could not be received as an admission that there was, at that time, a subsisting contract, but I read it most distinctly as an admission by the purchaser that there was a subsisting contract at that time. The language is to the effect that if a certain thing is not done within a week, and something else within a month, then the purchaser will consider the contract at an end. That is an admission that until the expiration of that week and month the contract was not at an end, and therefore it was in existence and in force on the 12th of December, 1864, when the notice was given, and that, consequently, excludes all the anterior time from the computation of delay.

The last point which was relied upon was this. It was said that a notice was given on the 12th of December, 1864, which effectually rescinded the contract, and the bill filed subsequently to that day must necessarily be dismissed. Now, that notice to rescind the contract was founded upon one of the most frivolous objections that ever was raised to a contract, and the Defendant's counsel could not but admit that if that objection failed, the notice to rescind failed also. The objection was this:—Sir *Thomas Sutton* had been seised in fee as copyholder of a moiety of that part of the property which *McMurray* purchased. He died in 1813, and by his will, dated in 1805, he bequeathed all his real estate to his daughter, Lady *Berkeley*. The copyhold property had not been surrendered to the uses of his will, and it was found expedient, as is very common in such cases, that instead of the devisees being admitted, the co-heiresses should be admitted, and, accordingly, the two daughters, the Baroness *di Troiesé* and Lady *Berkeley*, as co-heiresses, were admitted in 1816. This was the legal estate merely, because the beneficial interest had passed by the will to Lady *Berkeley*. As to the legal interest, being co-heiresses, they were coparceners; but coparceners are tenants in common, because upon the death of one of them her share does not go to the survivor, but to her heir-at-law. It is not a joint tenancy, but a tenancy in common of a peculiar nature, having some of the incidents of a joint tenancy, such as their being capable of releasing to each other.

They were admitted as tenants in common upon the face of the Court rolls, and properly so admitted.

So matters remained when this contract was entered into. The legal title in one moiety of the moiety in the copyhold was undoubtedly in the Baroness *di Troiesé;* but it being part of this contract that *McMurray* should enfranchise the property, he applied to the Crown, as the owner of the manor, for an enfranchisement; and it happened that this being part of the manor of *Claremont,* was vested in trustees. *McMurray* obtained a deed of enfranchisement; and the release of the estate was to the persons entitled to the copyhold: that is, Lord *Hotham,* Lady *Berkeley,* and the Baroness, their heirs and assigns; and it has been argued that the effect of that was to make them joint tenants of the freehold.

Now, with regard to this legal estate, in which way is it to be regarded? Is it the legal estate in the copyhold, or the legal estate in the freehold? I will take it either way. Taking it first as a copyhold title, if it had not been for the enfranchisement deed it is perfectly clear the legal estate would have been the copyhold legal estate. Then it can hardly be disputed that the sisters were not joint tenants. The admission in the Court rolls being as tenants in common, even if they had been admitted as coparceners, then that is a tenancy in common. This being a copyhold title, the Baroness was solely seised of one moiety of a moiety. She had no kind of interest in it, because the whole beneficial estate was devised to her sister. Having no beneficial estate, she was, as coheiress, admitted to a moiety, and of that moiety she was solely seised, and was, beyond all possibility of doubt, a trustee for her sister. She was therefore a person solely seised, the case falls within the 9th section and the vesting order was effectual.

However, the argument has been, that the deed of enfranchisement vested the property in them as joint tenants. Now I will suppose it to be so. Even in that case it does not fall within the 10th section, which is, that when any person or persons shall be seised or possessed of any lands (the words must be read in this section as in the previous one) upon any trust jointly with a person out of the jurisdiction of the Court, it shall be lawful for the Court to make an order vesting the lands in the person or persons so

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jointly seised or possessed, or in such last-mentioned person or persons, together with any other person or persons, in such manner and for such estate as the Court shall direct. Now I take it to be perfectly clear, that in order to bring the case within this section, there must be two persons jointly seised upon trust. Now, where are the two persons jointly seised upon trust found in this case? Where is the joint seisin of trustees here? The only person who is seised upon any trust is the Baroness; and I very much question whether she has any estate under the enfranchisement deed, because no person can take an estate without consent. I do not think she has consented to take any estate; but she ought rather, upon the evidence, to be considered as a person disclaiming that estate, and refusing to take it. However, if the operation of that deed was to convey the estate one person only is a trustee, and therefore this case is excluded from the 10th section, which applies only where two persons are jointly seised upon a trust; and it is a case which comes under the 9th section, which is when a person is "solely seised" upon a trust, and the Baroness being the only person seised of this property upon trust, that brings the case within the 9th section.

I think it altogether an untenable position for any purchaser to give notice to abandon a contract on such an objection, and my opinion is, that that notice, as an abandonment of the contract, wholly fails also. Consequently, upon no one of the grounds urged can I refuse to give specific performance of this contract. The contract, in my opinion, is one which, on every principle of the Court, the Defendant is bound specifically to perform, and a decree must be made accordingly.

Then the question is—what are to be the directions in Chambers as to the nature of the title. Now, it has been argued by Mr. *Jessel* that I am bound if I refer this case to Chambers to refer it as a perfectly open title; that I am to make a reference which will not cut short the title of the purchaser, to require this vendor to shew an absolute title of sixty years to every part of this property. I think if I were to make such an order I should be guilty of the greatest act of impropriety, after what has taken place between these parties. I should be doing an act of great injustice if I were to enable this purchaser to escape from the fulfilment of his

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contract. I am satisfied, upon the evidence, that the Defendant's father was told and that this Defendant perfectly well knew all that his father had been told, that the Plaintiff could only give him such a title as he could require from his vendor under a particular contract. It turns out that he can only require a limited title under that contract; but if I were to send him into Chambers upon any other terms the report would be against the title, and this bill would ultimately be dismissed.

The rule laid down in Lord *St. Leonards'* treatise (1), as deduced from the case of *Ogilvie* v. *Foljambe* (2) is this, "If a purchaser having full notice that he is not to expect a title beyond a limited period, concludes an agreement for purchase, he will be held to have waived his right. This is by matter of notice and not of contract." Here he had notice, and it is not necessary to put it on contract. 17 Eq 310 He had notice, but it was also contract, because the contract was based on the notice that *McMurray* could only make a limited title, and the purchaser contracted that that limited title only should be required. In the case of *Ogilvie* v. *Foljambe*, if you take the contract by itself, the contract is to purchase a house, which means the fee simple of a house, therefore Mr. *Foljambe* might have got out of the contract by demanding a fee simple or nothing, but he was not entitled to the fee simple, because he had notice that he was only carrying on a treaty for the purchase of a leasehold interest. Then he insisted upon having the lessor's title, but Sir *W. Grant* decided that when he entered into the contract he had notice of the conditions of sale, under which Mr. *Ogilvie* had stipulated that no purchaser should be entitled to require the lessor's title; and he, knowing that the property had been put up under those conditions, must be assumed to have treated subject to those conditions, and he was precluded from the right he would otherwise have had of requiring the production of the lessor's title. Therefore, in this case, not only by virtue of the notice but by virtue of the contract, I consider it to be perfectly clear that the purchaser has precluded himself from the right of requiring any other title than that which *McMurray* could shew under the contract with his vendors. That title I must therefore declare the Defendant bound to take.

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(1) Page 345, *placitum* 28, 14th Ed.
13th Ed 308

(2) 3 Mer. 53.

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But even if it had not been for that, I entirely subscribe to the rule laid down in the case of *Flint* v. *Woodin* (1), in which Sir *J. Wigram* says, that a purchaser who finds there is an objection, if he intends to rely upon it, must take his stand upon it at once; he cannot go on treating as if he had waived the objection, and then turn round afterwards and attempt to avail himself of it. In the present case, even if it had not been for the notice *Spicer* had when the original contract was entered into, still when the abstract was first delivered, and he required a copy of the contract which *McMurray* had entered into with his vendors, that was a waiver of the right to require any other title. I put it, therefore, not only on the ground of the original contract and the notice, but also on the ground of his deliberately proceeding to complete the contract after he had notice of the title under which *McMurray* held the property. I accede, therefore, to the argument that the Defendant is not entitled to any other title to this part of the property than what *McMurray* can acquire under his contract.

But it is argued for the Plaintiff, that I ought to limit the title still further; that the Defendant should only require the fulfilment of those requisitions which were made on the 14th of June by the Defendant's counsel and communicated to the Plaintiff as the opinion upon which the Defendant was prepared to act. By sending the letter and enclosing the opinion of counsel, I consider the Defendant as adopting that opinion, and as waiving every objection which is not stated in that opinion. On these grounds, I also accede to the argument that the Defendant is only entitled to require such title as *McMurray* can require under his contract with his vendors, and that *McMurray* is only bound to answer such requisitions upon the title as are embraced in the opinion of counsel of the 14th of June, 1863.

Then, as to the general argument, I entirely accede to the doctrine laid down in *Parkin* v. *Thorold* (2), which is, that time not being of the essence of the contract originally, either of the parties may by subsequent notice make it so. There was no time fixed here, and the parties were at liberty at any period to make time of the essence of the contract; but when they have been going on negotiating for the completion of the contract, and both parties

(1) 9 Hare, 618.

(2) 16 Beav. 59.

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10 Eq 28

have proceeded on the basis that the contract is to be performed if a title can be shewn: if the purchaser alleges that an insufficient title has been shewn, that implies that something more ought to be done, and he is bound to give the vendor a reasonable time for doing it. No absolute rule can be laid down as to what is a reasonable time. That must depend upon a variety of circumstances; you must look to what was the knowledge of the purchaser as to the vendor's title, and to all the surrounding circumstances, and say what is a reasonable time. In *Parkin* v. *Thorold* (1) the Master of the Rolls overruled the decision of Lord *Cranworth* in the same cause (2), and held that ten days or a fortnight was not sufficient notice, and that the contract was still in force. That decision was affirmed by the Lords Justices. The point argued before me that this contract was rescinded because a reasonable notice was given, independently of all the other objections I have stated to that notice, even in point of time, I hold to be wholly unreasonable. A distinction was attempted to be drawn from the fact that the words of the notice were, "If you do not comply with my requisitions or agree to do so." I do not think it makes any substantial difference, because if the notice is too short to require the thing to be done, it is too short also, in my opinion, to require the opposite party to agree to do it, because before a man can agree to do it he has to ascertain if he has the power of doing it. The notice here was a week, which I think was too short a time. He was bound to give him a reasonable time, and I think that a week or even a month was too short, and, on the principle of *Parkin* v. *Thorold*, the notice was ineffectual for the purpose of rescinding the contract upon the ground of the time not being a reasonable time.

Upon all these grounds, I think that the purchaser's conduct has been unjustifiable. He has avowed, through his counsel, that his only object was to take every objection which the ingenuity of counsel could suggest, to enable him to evade the contract, which he no longer desires to complete, because he has sold the estate for the advantage of which his father entered into the contract with *McMurray*. I am glad to have come to the conclusion that he cannot do so. He has put the Plaintiff to very great expense, and

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(1) 16 Beav. 59.

(2) 2 Sim. (N.S.) 1.

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has imposed a very heavy task on this Court, and has unnecessarily occupied a great deal of time that might well have been given to other cases; I therefore have no hesitation in following the Master of the Rolls in *Parkin* v. *Thorold* (1), and declare that, whatever may be the result in Chambers, up to and including the hearing the costs must be paid by the Defendant.

Declare that the Defendant is bound to accept the title of the Plaintiff to the estate mentioned in the agreement, subject to the requisitions in the opinion dated the 14th of June, 1863, and subject also, as regards such parts of the purchased premises as the Plaintiff was at the time of the execution of his agreement with the Defendant under agreement to purchase, to the Plaintiff's making out such title as he was, by his agreement with his vendors, bound to accept from them, and as should be contained in the deed of enfranchisement of the copyhold part of the property. And declare that the Plaintiff is entitled to a specific performance of the agreement, provided that he can make a good title to the property comprised in the said agreement, subject as before-mentioned. Costs up to and including the hearing to be paid by the Defendant.

Solicitors for the Plaintiff: Messrs. *Vizard, Crowder, Anstie, & Young.*

Solicitors for the Defendant: Messrs. *W. & H. P. Sharp.*

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(1) 16 Beav. 59.

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April 17.

Trustee and Cestui que Trust—Statute of Limitations.

The analogy of the *Statute of Limitations* cannot be set up by an executor in answer to a claim founded on a breach of trust by his testator.

Dunne v. *Doran* (1), and *Brereton* v. *Hutchinson* (2), not followed.

8 Eq 579
5 Ch 77
10 Ch 57
5 Ch D 32
20 Ch D

THIS bill was filed by *Sarah Anne Brittlebank* and *Lucy Brittlebank,* daughters, and two of the three next of kin of *Ann Goodwin,* afterwards *Brittlebank,* against *Mary Goodwin* and *George Goodwin Brittlebank,* in respect of their interest in a sum of £5000.

George Goodwin the elder, by his will, dated the 30th of November, 1809, bequeathed to his wife, *Sarah Goodwin,* her executors and administrators, a sum of £10,000, "to be by her or them laid out and invested in government or land security at interest in the name of his said wife, her executors or administrators." He directed that the interest arising from the said sum of £10,000 should be paid to his daughter, the said *Ann Goodwin,* half-yearly, until she should attain twenty-five years; and he also directed that the receipt of *Ann Goodwin,* notwithstanding coverture, should be good and valid in law, and that the same or any part thereof should not be subject to the debts or control of her husband; and when and so soon as the said *Ann Goodwin* should have attained twenty-five, upon trust that she, testator's said wife, her executors or administrators, should pay or cause to be paid to the said *Ann Goodwin* the sum of £5000, part of the said sum of £10,000; and upon further trust as to the remaining sum of £5000, that the annual interest or proceeds should be paid to the said *Ann Goodwin* for her life, half-yearly; and that the same should not be subject or liable to the debts or control of her husband, but that her receipts alone should be good discharges for the same; and upon further trust that the said last-mentioned sum of £5000 should, within six months next after the decease of the said *Ann Goodwin,* be paid and applied as she should by her will, executed as therein prescribed, appoint; and in default of such

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(1) 13 Ir. Eq. Rep. 545. (2) 2 Ir. Ch. Rep. 648; S. C. 3 Ir. Ch. Rep. 361.

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last will, "to such person or persons who shall be legally entitled to take out administration to my said daughter, and that the same shall be paid and divided to, between, and amongst such persons who shall be entitled to receive the same as next of kin to my said daughter, in due and regular course of administration."

The testator died shortly after the date of his will, leaving his widow, *Sarah Goodwin*, and two children, the said *George Goodwin* the younger, and the said *Ann Goodwin*, him surviving.

Sarah Goodwin proved the testator's will, and possessed herself of the £10,000.

By an indenture dated the 30th of April, 1818, and made between *John Brittlebank*, of the first part, the said *Sarah Goodwin* and the said *Ann Goodwin*, of the second part, and the said *George Goodwin* the younger, of the third part (being a settlement made in contemplation of the marriage of *John Brittlebank* and *Ann Goodwin*), after reciting that, "in contemplation of the said intended marriage it has been agreed that the sum of £5000 so given and bequeathed in trust to be paid to the said *Ann Goodwin* on her attaining the age of twenty-five years as aforesaid, shall be assigned to the said *George Goodwin*, party hereto, upon the trusts hereinafter mentioned; and that the remaining sum of £5000 bequeathed by the said will of the said *George Goodwin*, deceased, shall remain vested in the said *Sarah Goodwin*, her executors and administrators, upon the trusts in the said will declared of and concerning the same, subject nevertheless to the proviso in the indenture now in statement contained," it was (amongst other things) declared that the said sum of £5000 should continue in the hands of the said *Sarah Goodwin*, her executors or administrators, upon the trusts in the will of the testator declared. And it was by the same indenture further declared, that "in case the said *John Brittlebank* and *Ann* his intended wife shall after their marriage, by any writing signed" as therein mentioned, "request the said *Sarah Goodwin*, her executors or administrators, to advance and lend the sum of £5000 unto the said *John Brittlebank* at interest on security of the bond of the said *John Brittlebank*, it shall be lawful for the said *Sarah Goodwin*, her executors and administrators, so to do, so long as she or they shall think proper. . . . And if any loss shall happen by reason of the said . . . .

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sum of £5000 lent and advanced to the said *John Brittlebank*, the said *George Goodwin* and *Sarah Goodwin*, or either of them, their or either of their heirs, executors, or administrators, shall not be answerable or accountable for such loss, provided the money be so lent and advanced to the said *John Brittlebank* at the request in writing of the said *John Brittlebank* and *Ann* his intended wife, anything in the said indenture or in the said will of the said *George Goodwin*, deceased, contained to the contrary notwithstanding."

The marriage took place, and *Sarah Goodwin*, in June, 1818, upon the written request of *John* and *Ann Brittlebank*, advanced the £5000 to *John Brittlebank* on the security of his bond. To this written request there were two attesting witnesses, of whom the Defendant *Mary Goodwin* was one.

On the 18th of February, 1821, *Sarah Goodwin* died, having by will, dated in 1810, devised and bequeathed all her real and personal estate to her children, *Ann* and *George Goodwin*, and their respective heirs, executors, administrators, and assigns, as tenants in common, and appointed *William Barker* her sole executor, who renounced probate. Letters of administration with the will annexed were granted to *George Goodwin* the younger.

On the 7th of September, 1836, *Ann Brittlebank* died intestate, leaving her husband surviving, and three children, the two Plaintiffs, and the Defendant *George Goodwin Brittlebank*, her sole next of kin.

In February, 1851, *John Brittlebank* died intestate. Letters of administration were granted to the Defendant *George Goodwin Brittlebank*, but the estate, real and personal, was insolvent.

In September, 1851, *George Goodwin* the younger died, having by will, dated in March, 1851, devised and bequeathed all his estates, real and personal (which were of large amount), to his wife, the Defendant *Mary Goodwin*, and having appointed two executors, of whom *Mary Goodwin* became the survivor.

This bill was filed in January, 1866, seeking to recover the £5000, and to make the estates of *Sarah Goodwin*, both real and personal, and the personal estate of *George Goodwin*, liable for the amount; and prayed accordingly.

It alleged that the Plaintiffs in October, 1865, for the first time, were made acquainted with their rights and with the advance to

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John Brittlebank. Plaintiffs also at the same time discovered, that by a letter in August, 1836, the legal advisers of *George Goodwin* the younger advised him that he was not justified in allowing the £5000 to remain on *John Brittlebank's* bond.

The following paragraphs occurred in the amended bill, which were particularly referred to in the judgment:—

"24. Thereupon (as the Plaintiffs have at the time and in manner aforesaid discovered) the said *George Goodwin* agreed with the said *John Brittlebank* that the latter should execute a mortgage on certain real estate, called *Newton Leys*, and *Parwich*, in the county of *Derby*, of or to which he was seised or entitled, and which, though subject to a prior mortgage, was then of ample value to secure the said sum of £5000. It was, in fact, of the value of £10,000 and upwards. The necessary mortgage deed was accordingly prepared and engrossed at the request of the said *George Goodwin* the younger; but, owing to his neglect, the said deed was never executed, and the said *George Goodwin*, having complete knowledge of the whole transaction, and having wilfully neglected to obtain the security offered him for the said sum of £5000 and interest, became personally liable to make good to the Plaintiffs their share in the said sum of £5000, and interest from the death of the said *Ann Brittlebank*.

"25. The Plaintiffs shew that the said *John Brittlebank* never repaid the said sum of £5000, or any part thereof, and that his estate having subsequently become insolvent, it is impossible to recover the same or any part thereof, except from the Defendants.

"29. The Plaintiffs further shew that on the decease of the said *Sarah Goodwin*, her son, the said *George Goodwin* the younger received and took possession of the whole of her personal estate, far more than sufficient to answer the said legacy of £5000 and interest due to the Plaintiffs as aforesaid; and that he also received personal estate belonging to his father, the said *George Goodwin* the elder, to a very large amount, far exceeding the Plaintiffs' claim; and that consequently he became, and his estate is now, liable to make good the said legacy and interest claimed by the Plaintiffs. His estate is also now liable to make good the same, in consequence of his neglect in obtaining the said security on the said property in the county of *Derby*, called *Newton Leys* and *Parwich*."

Mr. *Kay*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiffs, and Defendant *G. G. Brittlebank*, on the question of the *Statute of Limitations*, the only one of general importance in the cause, cited *Story* v. *Gape* (1); *Obee* v. *Bishop* (2).

Mr. *Amphlett*, Q.C., and Mr. *B. B. Rogers*, for the Defendant *Mary Goodwin*, relied on *Dunne* v. *Doran* (3), *Brereton* v. *Hutchinson* (4), and *Newport* v. *Bryan* (5), cited in a note to *Obee* v. *Bishop* (6).

Mr. *Kay*, in reply.

Apr. 17. SIR G. M. GIFFARD, V.C., after stating the frame of the suit, and the contention that had been raised, continued:—

It could not, of course, be contended that the loan of £5000 on the bond of *John Brittlebank* was not a clear breach of trust; but it was insisted that *John Brittlebank* himself had a beneficial interest in the £5000, according to the true construction of the will of *George Goodwin* the elder—that, at all events, if he had not, he, as being legally entitled to administer to his wife, was on her death the hand to receive the £5000—that consequently *George Goodwin* the younger was excused for not proceeding against him; further, that the allegations in the bill were not sufficient to charge *George Goodwin* the younger's estate for wilful default on his part; and, finally, it was insisted that there were laches and acquiescence on the part of the Plaintiffs, and the *Statute of Limitations* was relied on, and certain Irish decisions, to which I will by-and-by advert, were quoted, as supporting the view of the claim being barred by the statute.

Now it is plain that *John Brittlebank* took nothing beneficially under the will of *George Goodwin* the elder, for he was not his wife's next of kin; and the £5000 was to be divided between and amongst such persons as should be the next of kin of *Ann* his wife.

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(1) 2 Jur. (N. S.) 706.

(2) 1 D. F. & J. 137. 6 Jur NS/32

(3) 13 Ir. Eq. Rep. 545.

(4) 2 Ir. Ch. Rep. 648; S. C. 3 Ir. Ch. Rep. 361.

(5) 5 Ir. Ch. Rep. 119.

(6) 1 D. F. & J. 142.

It is plain that *Sarah Goodwin* was a trustee of *John Brittlebank's* bond, and that on her death her administrator became a trustee just as much as *Sarah Goodwin* was, for *Ann Brittlebank* did not die till September, 1836, a period of eighteen years or nearly so after the death of her mother. Until her death nothing was or could be payable to the person or persons legally entitled to take out administration to her. It is, I think, questionable whether it was intended by the will to interpose any person who was not one of the next of kin in a due course of administration, as a person entitled to receive the £5000. Assume, however, that it was—and assume that administration had been taken out, which does not appear to be the case. This would have afforded no defence at law to an action on the bond, and most assuredly no suit in equity for the purpose of an injunction could for one moment have been maintained except on the terms of *John Brittlebank* paying the £5000 and interest into Court. The legal interest in the bond after the death of *Sarah Goodwin* was in her administrator. I am satisfied from the evidence that *George Goodwin* the younger knew all the facts with reference to the breach of trust and bond. Neither *Sarah Goodwin* nor he could ever have been heard to say that they were not trustees of the bond, or that they had not, as such trustees, duties to perform towards their *cestui que trust*. One of those duties most unquestionably was to put the bond in suit, that is, if by so doing payment of any part of it could have been obtained. Another duty was to have informed the persons interested, when they attained twenty-one, of the position of the fund and of their rights. This was not done, nor was the bond put in suit; and though the 24th, 25th, and 29th paragraphs of the bill might well have gone farther than they do, I think them sufficient to sustain a decree for an inquiry.

This brings the matter to the two remaining points, viz., laches and acquiescence, as distinct from the *Statute of Limitations*, and then the statute.

I am satisfied on the evidence that the Plaintiffs did not know of their rights, or of the facts on which their rights depend, till towards the end of 1865, and the bill was filed early in 1866. Laches, therefore, and acquiescence there were not.

As regards the statute, two cases were referred to which have been decided in *Ireland*. The first was that of *Dunne* v. *Doran* (1). That was decided on the equity side of the Exchequer, and three learned Judges concurred with the then Chief Baron *Brady*. It was a bill filed for the purpose of affecting the real estates of *Edmund Doran*, who, as administrator of one *Stapleton*, had received *Stapleton's* assets, paid the Plaintiff a small sum due to her on account of her share in *Stapleton's* personal estate as one of his next of kin, and then died. The bill was filed twelve years after the death of *Edmund Doran*, against the devisee of real estate under his will, and against his executor, and was dismissed as being a bill to recover a simple contract debt. In the course of the judgment the following observations were made: "The case would have been entirely different if the administrator to the intestate were still living; or if the lands sought to be charged were part of the property of the original intestate, and the very thing which the Plaintiff was entitled to; for in such a case, upon the authority of *Scott* v. *Knox* (2), length of time would have been no bar. But this is not that case; this is the case of a simple contract debt sought to be attached upon the deceased debtor's real estate, and it must, therefore, abide the rule common to it, with all other simple contract debts, of being barred by the *Statute of Limitations* after six years."

The second case was the case of *Brereton* v. *Hutchinson* (3), which was heard first by the Master of the Rolls, and then by the Lord Chancellor; Chief Baron *Brady* having in the meantime been promoted to that office. The case before the Master of the Rolls is reported in the Irish Chancery Reports (4). The Master of the Rolls considered himself bound by the decision of the Court of Exchequer in the case of *Dunne* v. *Doran*, but he dissented from that decision on the ground that the debt, in his opinion, was a *debitum ex delicto*, and was not founded on a lending or contract, although it would rank in the administration of assets as a simple contract debt. He stated that *William Henry Hutchinson* was the Petitioner's trustee, and could not have attempted to set up the statute, and then asked, "How does a demand which never was founded on a lending or contract, as against the testator, become a

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(1) 13 Ir. Eq. Rep. 545.

(2) 4 Ir. Eq. Rep. 397.

(3) 2 Ir. Ch. Rep. 648; S. C. 3 Ir. Ch. Rep. 361.

(4) Vol. ii. p. 648.

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debt founded on a lending or contract as against his executors?" The case before the Lord Chancellor is reported in the Irish Chancery Reports (1). The Lord Chancellor repeats what had been said by the Master of the Rolls, viz., that *William Henry Hutchinson*, having been a trustee, could not in his lifetime rely on the *Statute of Limitations* as against his *cestui que trust;* but quoting from the case of *Dunne* v. *Doran* (2), he added: "This is the case of a simple contract debt, sought to be attached upon the deceased debtor's real estate, and it must, therefore, abide the rule common to it with all other simple contract debts, of being barred by the *Statute of Limitations* after six years." He stated in the course of his judgment that, "so far as regards the language of the *Statute of Limitations* respecting actions of debt, I am clearly of opinion that it has no bearing on this question;" and that, "if there were no other foundation for the order than that which is to be found in the argument deduced from that language, that order could not be supported." He then quoted the decision of Lord *Redesdale*, in the case of *Adair* v. *Shaw* (3), and continued: "It is then, I think, clear that it is by force of its own peculiar doctrines in cases of trust, both as regards the origin of the demand and the liability of the assets of the deceased, that in cases such as this relief is given in a Court of equity. It is a branch of the doctrine that, unless in cases of trust created by specialty, the liability of a deceased trustee who has committed a breach of trust ranks against his assets but as a demand by simple contract; and the case of *Dunne* v. *Doran* decided that, as such, it is subject to the rules on which a Court of equity acts in analogy to the *Statute of Limitations*, and is barred by the lapse of six years from the death of the trustee before the initiation of the suit." The Lord Chancellor then follows the decision in *Dunne* v. *Doran*, stating that he had communicated with the Lord Chief Justice and another learned Judge on the subject, who concurred in his opinion.

In opposition to this view, there are in this country the *dicta*, at all events, of three eminent Judges in three different cases. In *Baker* v. *Martin* (4), the Vice-Chancellor of *England* said: "The testator was in the situation of a trustee for the creditors of the

(1) Vol. iii. p. 361.
(2) 13 Ir. Eq. Rep. 545.
(3) 1 Sch. & Lef. 243.
(4) 5 Sim. 380.

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bankrupt. How, then, can the lapse of time, either in his lifetime or since his death, affect the debt?" In *Story* v. *Gape* (1) the present Lord Justice *Wood,* then Vice-Chancellor, said: "The *Statute of Limitations,* of course, never can be set up in a question in this Court between a trustee and *cestui que trust.* If this were a simple contract debt, or a specialty debt of the testator, the executor could plead in the one case six years' limitation, in the other case (if such a space of time had elapsed) twenty years. But in the case of a breach of trust he cannot plead the statute, for his testator could not; he must answer as his testator would have had to answer. And in *Obee* v. *Bishop* (2) Lord Justice *Turner* said: "With respect to the general personal estate, I am of opinion that it would be most dangerous to hold that a demand against the assets of a deceased trustee, or personal representative, in respect of a breach of trust or misappropriation committed by him, is barred at the expiration of six years from his death. Courts of equity, in dealing with equitable debts, are not bound by the *Statute of Limitations,* 21 Jac. 1, c. 16; and although they have in many instances adopted a rule grounded on an analogy to that statute, they do not extend that analogy to demands arising out of breaches of trust."

It is needless to observe that, though this Court is not bound by the decisions in *Ireland,* it would always treat them as, and feel them to be, of the greatest weight. After much consideration, however, I have felt myself unable to follow the authorities that have been cited; for I think that the *dicta,* I may almost say, in two of the cases, the decisions, of the eminent Judges in this country which I have quoted are founded on sounder principles. I find it laid down most distinctly, both in this country and in *Ireland,* and nowhere controverted, that the *Statute of Limitations* itself does not in terms apply to a liability for a breach of trust; and that, so long as the trustee himself is alive, he never can be heard to set up the statute. The liability of the executor, or devisee of a testator, or the administrator or heir of an intestate, does not depend on any new *assumpsit,* but originates from, and depends entirely on, the liability of the testator or intestate. It is a liability simply as representing a testator or intestate in respect

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(1) 2 Jur. (N. S.) 706.

(2) 1 D. F. & J. 137, 141. 6 Jur. n.s. 132

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of the testator's or intestate's property; and if the testator or intestate could not have set up the statute, why should those who take his property, subject to the liability of paying his debts so far as that property will extend, be heard to do so? If the obligation of the testator or intestate be a specialty debt, or a future or a contingent debt, the liabilities of those who represent his personal or real estate depend in each case on the nature of his liability; and if in those cases, why not in the case of a breach of trust?

Surely they all rest on the same principle, viz., that the extent and nature of the testator's or intestate's debts must regulate the administration of his assets; and that those who take his assets as volunteers must answer to the extent of the assets they take, just as their testator or intestate would, if living, have been bound to answer. This appears to me a rule consistent with itself, as well as with sound reason and justice.

The decree, therefore, must be:—

Take an account of what is due to the Plaintiffs for principal and interest in respect of their shares of the £5000.

Take an account of the personal estate of *Sarah Goodwin*, received by *George Goodwin* the younger, or by the Defendants, or either of them. If assets of *George Goodwin* the younger are not admitted for this purpose, there must be an account of his real and personal estate, and if, on these accounts being taken, there is a deficiency, there must be an inquiry whether, at any time subsequently to the decease of *Sarah Goodwin*, *John Brittlebank* was of ability to provide for the £5000 and interest, secured by the bond, or any and what part thereof.

Further consideration and costs must be adjourned, with the exception I will presently mention.

The bill must be dismissed without costs, so far as regards the real estate, if any, of *Sarah Goodwin;* for, having regard to the date of her death, her real estate was not liable for simple contract debts as the law then stood; and I am clearly of opinion that the settlement on Mrs. *Brittlebank's* marriage did not constitute a specialty debt.

Mary Goodwin must pay the costs up to the hearing, so far as they were increased by the affidavits filed on her behalf, and any allegations in the answer imputing laches to the Plaintiff. I do not think *Mary Goodwin* was justified in imputing laches to the Plaintiff, or in bringing forward the evidence which she did upon the subject. Under the circumstances she would have been fully justified in leaving the Plaintiffs to prove their own case, and so far get their ordinary administration decree.

Solicitor for the Plaintiffs: Mr. *H. Tyrrell.*

Solicitors for the Defendants: Messrs. *Cree & Last,* agents for Mr. *John Taylor, Bakewell, Derbyshire.*

JONES *v.* GREEN.

V.-C. G.
1868
March 16.

Order in Lunacy—Sale of Shares specifically bequeathed by Lunatic—Ademption of Gift of Income of Shares—16 & 17 *Vict. c.* 70, *ss.* 2, 119.

A testator, by will, bequeathed the income of certain shares specifically, and bequeathed the shares to his residuary legatee. After the date of the will, he was found a lunatic, and by an order in the lunacy, the shares were directed to be sold, and the proceeds were invested in consols:—

Held, that as the provisions of the *Lunacy Regulation Act*, whereby the rights of owners of property sold by order of the Lord Chancellor in Lunacy are preserved, extend only to land, the gift of income was adeemed by the sale, and the sum of consols fell into the residue.

13 Eq 475
22 LDb.
826, 5

FURTHER consideration.

George Edmunds, by his will, made in the year 1863, appointed his nephew, *John Bowen*, and *John Green*, trustees and executors of his will, and after bequeathing several pecuniary legacies, bequeathed to his said trustees £500 sterling upon trust for the Plaintiff, *Elizabeth* wife of *Edmund Jones*, for life; and from and after the decease of *Edmund Jones*, if the Plaintiff should survive him, then the whole of the trust funds for the Plaintiff, for her absolute use and benefit; but in case *Edmund Jones* should survive the Plaintiff, upon trust to pay the income to *Edmund Jones* for life; and after his death the trust funds to be in trust for the children of *Elizabeth Jones* by the said *Edmund Jones.* Testator then, after reciting that he was possessed of a policy on the life of *Edmund Jones*, directed that the annual premiums should be paid out of the dividends to be derived from his shares in the "*Assam*

Company;" and declared that, should such dividends be found insufficient to meet the premium, then it should not be imperative upon his trustees and executors to continue the policy. And the said testator empowered them, in either of the events last mentioned, to surrender or abandon the said policy, or otherwise to deal therewith as they or he might in their uncontrolled and absolute discretion think fit and expedient. And (subject as aforesaid) he (the testator) thereby directed that, in the event of the death of *Edmund Jones* in the lifetime of the Plaintiff, his trustees should pay to *Elizabeth Jones* all sums of money which should be received by them under the policy; but in case she should not survive her husband, then, subject as aforesaid, he directed his trustees to stand possessed of all such sums of money as should be received by them under the policy upon the trusts declared concerning the bequest of £500.

He then bequeathed to the said *John Bowen* his shares in the *Assam Company* (subject to the charge upon the interest or dividends to accrue or be derived therefrom for payment of premiums upon the policy); and also all the residue of his real and personal estate.

By an inquisition in Lunacy, dated the 13th of July, 1864, the testator was found to be of unsound mind; and by an order in Lunacy, made in the matter of the testator, and dated the 17th of February, 1865, *Richard Edmunds*, as committee of the estate of the testator, was directed to sell the *Assam Company* shares.

In pursuance of the order, the shares in the *Assam Company* were sold on the 6th of May 1865, and the proceeds, amounting to £621, were paid to the account of "In the matter of *George Edmunds*, a person of unsound mind," and were invested in the purchase of £680 11*s.* consols.

John Bowen died in the lifetime of the testator.

The testator died on the 6th of November, 1865, and his will was proved by the Defendant *John Green.*

This bill was filed on the 9th of August, 1866, by *Elizabeth Jones*, by a next friend, against *John Green* and *Edmund Jones*, praying for administration.

Pursuant to a decree dated the 8th of December, 1866, inquiries were made, and the Chief Clerk, by his certificate, dated the 17th of

January, 1868, amongst other things, reserved the question of whether the policy should in future be kept up, and out of what funds the premiums thereon ought to be paid.

The dividends of the consols were insufficient to pay the premiums in full.

Mr. *Druce*, Q.C., and Mr. *Maidlow*, for the Plaintiff :—

The legacy of the proceeds of the *Assam* shares was not adeemed by the order in Lunacy directing their sale ; and consequently the dividends of the consols are applicable in payment of the premiums.

The 119th section of the *Lunacy Regulation Act* (16 & 17 Vict. c. 70), which might be expected to govern the case, unfortunately is in terms restricted to " land ;" and by the interpretation in sect. 2 " land " is made to comprehend real hereditaments, " and also property of every description transferable otherwise than in books kept by any company or society " (1). So that these *Assam* shares appear to be untouched by the statute, and the old law must be considered.

In *Partridge* v. *Partridge* (2), a leading authority, the Lord Chancellor, says :—" All cases of ademption of legacies arise from a supposed alteration of the intention of the testator," and a legacy

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(1) Sect. 2 of the *Lunacy Regulation Act* (16 & 17 Vict. c. 70) provides as follows :—

" The word ' land ' shall be construed to comprehend any manor, messuage, tenement, hereditament, or real property of whatsoever tenure, and also property of every description transferable otherwise than in books kept by any company or society, or any share thereof or charge thereon, or estate or interest therein."

Sect. 119 is as follows :—" On any moneys being raised by sale, mortgage, charge, or other disposition of land, made in pursuance of any of the foregoing provisions, the person whose estate is sold, mortgaged, charged, or otherwise disposed of, and his heirs, next of kin, devisees, legatees, executors, administrators, and assigns, shall have such and the like interest in the surplus moneys remaining after the purposes for which the moneys have been raised shall have been answered, as he or they would have had in the estate if no sale, mortgage, charge, or other disposition thereof had been made, and the surplus moneys shall be of the same nature and character as the estate sold, mortgaged, charged, or otherwise disposed of ; and the Lord Chancellor intrusted as aforesaid may make such orders, and direct such conveyances, deeds, and things to be executed and done (which may and shall accordingly be executed and done), as may be necessary for the effectuating this present provision, and for the due application of the surplus moneys."

(2) Cas. t. Tal. 226.

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of *South Sea* Stock was held not to have been adeemed, either by a sale of part of it by the testator, or by an Act of Parliament which converted the stock into annuities. This was followed in *Bronsdon* v. *Winter* (1). A conversion of shares into stock will not operate as an ademption: *Oakes* v. *Oakes* (2); nor of railway bonds into shares: *In re Pilkington's Trusts* (3). In *Basan* v. *Brandon* (4), a direction by a testator to change the state of investment of a fund, which direction he might have revoked, and which was never, in fact, executed, was held not to have adeemed a legacy.

Taylor v. *Taylor* (5) was a case of lunacy, the lunatic being not so found. There a dealing with the testator's assets after his lunacy by his wife and the persons whom he had appointed his executors, though approved of by the Master in Chancery in the suit, was held not to have operated as a conversion. This was followed by Vice-Chancellor *Stuart* in *Jenkins* v. *Jones* (6).

Durrant v. *Friend* (7) may be cited on the other side, but that turned entirely upon different principles: as appears from *General Stanwix's Case* (8).

Browne v. *Groombridge* (9) was a question between legatees. This is a claim by next of kin against a person in whose favour the testator has made a disposition.

Before the passing of the statute which took away from infants the power of making wills of personal estate, personalty of an infant, laid out by the Court in the purchase of land, retained its character of personalty in order that the infant's right of disposition might not be prejudiced: *Ware* v. *Polhill* (10); *Ex parte Phillips* (11).

The intention of the Legislature may be sufficiently gathered, notwithstanding the omission in the statute. In *Cooke* v. *Dealey* (12), money, the overplus proceeds of real estate sold in an administration suit to pay debts, was held to be of the character of real estate.

Mr. *Mackeson*, Q.C., for the next of kin claiming the residue

(1) Amb. 57.
(2) 9 Hare, 666.
(3) 6 N. R. 246.
(4) 8 Sim. 171.
(5) 10 Hare, 475.
(6) Law Rep. 2 Eq. 323-9.
(7) 5 De G. & Sm. 343.
(8) Fearne's Post. Works, pp. 37-58.
(9) 4 Madd. 495.
(10) 11 Ves. 257, 278.
(11) 19 Ves. 118.
(12) 22 Beav. 196.

as having lapsed by reason of the death of *John Bowen* in the testator's lifetime:—

None of the cases cited on the other side on the question of ademption come up to the present.

It cannot be within the equity of the statute that "land" shall include "shares," for they are expressly excluded.

It is clear that, according to the old law, the order of the Lord Chancellor in Lunacy left property in the same condition as it happened to be in at the death of the lunatic, in the absence of any special order that the proceeds of land should be considered as land, and of money as money. There was no opportunity for discretion; the Court had no power to deal with the question. The case has been argued as if the absence of a direction by the Court makes no difference as to the discretion of the Court; but, if so, why was it ever given? *Oxenden* v. *Lord Compton* (1); *Ex parte Grimstone* (2); *Newcombe* v. *Newcombe* (3); *Lord Leitrim* v. *Enery* (4); *Holmes* v. *Goodworth* (5); *Shelford* on Lunatics (6); the case cited in the judgment in *Ex parte Phillips* (7); *Ex parte Haycock* (8).

Mr. *Prendergast*, Q.C., and Mr. *Fischer*, for the Defendants.

Mr. *Druce*, in reply:—

The principle of equity is different since the passing of the Act. The shares were sold in order to be placed in another state of investment. Can that be an ademption? They were converted, not for the purpose of being dealt with for the benefit of the lunatic, but simply to be preserved for his benefit.

The case is new, and independent of the old authorities.

SIR G. M. GIFFARD, V.C.:—

No doubt, by inadvertence, there has been an omission in the *Lunacy Regulation Act*, 1843 (16 & 17 Vict. c. 70). It has not been, nor can it possibly be contended that these *Assam* shares

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(1) 2 Ves. 69, 70.
(2) Amb. 706.
(3) 3 Ir. Eq. 414, 424.
(4) 6 Ibid. 357, 368.
(5) 7 L. J. (Ch.) 128.
(6) Page 296 *et seq.*
(7) 19 Ves. 118.
(8) 5 Russ. 154.

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were included in the statute. The Act must therefore be put aside, and the state of things considered wholly without it.

Now the order in Lunacy was plain. There might, no doubt, have been a direction accompanying the order, that the proceeds of the shares were to belong to the same persons as were the owners of the original shares. But the order contains no such provision. What, then, is the result? All the authorities shew that the conversion must be treated as a lawful conversion, exactly as if the testator had himself converted the shares into consols. Such an act on his part would clearly have adeemed the gift.

Therefore it is plain that this sum of consols is inapplicable to payment of the premiums on the policy.

Mr. *Druce*:—

At all events the trustees have power, under the discretion reposed in them by the will, to keep up the policy out of the residue.

Mr. *Mackeson*:—

Unless the clause amounts to an express direction to keep up the policy out of the residuary estate, it amounts to nothing.

SIR G. M. GIFFARD, V.C.:—

Upon the construction of the will I do not think the discretionary power given to the trustees extends to a state of things where the shares themselves no longer exist. From the language of the testator it is obvious that when the shares have failed, the discretion has failed also.

There must be a declaration that the benefit of the *Assam* shares was adeemed, and that the interest in the sum of consols fell into the residue.

Solicitor for the Plaintiff: Mr. *W. R. Brooks.*
Solicitors for the Next of Kin: Messrs. *Jones & Blaxland.*
Solicitors for the Defendants: Messrs. *Thomson & Son.*

In re LONDON AND COLONIAL COMPANY.

V.-C. G.
1868
March 14, 18.

HORSEY'S CLAIM.

Company—Winding-up—Lease—Dividend—Claim of Lessor in respect of future Rent.

After a lessor of premises to a company, now in liquidation, had obtained leave to enter a claim for the amount at which the future rent was estimated, in the terms of the order in the case of *In re Haytor Granite Company* (1), a dividend was paid by the liquidators:—

Held, that the lessor was not entitled to have a sum equal to the dividend upon the amount at which the future rent was estimated, impounded, to secure payment of the future rent; and summons for that purpose, dismissed.

10 Eq 35
—414,—5
13 Eq 62
5 Ch D. 2
252
7 Ch D. 6

THIS was an adjourned summons on behalf of a Mr. *Horsey*, who was the lessor to the *London and Colonial Company, Limited*, for a term of twenty-one years from Lady Day, 1866, at a rent of £1800, of premises, No. 18, *Billiter Street*, which had been used by the company as a place of business.

The company were incorporated for the purchase and carrying on of a brewery business; and were empowered by one of their articles to "hire any offices or buildings or other premises for the business of the company, and generally on behalf of the company to enter into such contracts, agreements, and arrangements, and to make or take such purchases, leases, sales and dispositions, and for such considerations, on such terms, and in such manner and form as they may, from time to time, think fit and proper for the purposes of the undertaking."

In March, 1867, an order was made for continuing a voluntary winding up of the company under supervision, and Mr. *Horsey*, in February, 1868, took out a summons for leave to enter a claim against the company for the sum of £26,000 and upwards, being the whole or total estimated amount of the rent; or that a sum of money sufficient to cover the whole of the rent might be ordered to be paid into Court out of the assets of the company, or otherwise impounded, to answer any default in payment of the rent, and to secure the due performance of the covenants.

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(1) Law Rep. 1 Ch. 77, 81. 12 Jur N.S. 1

V.-C. G.
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In re LONDON AND COLONIAL COMPANY.

HORSEY'S CLAIM.

The claim was resisted by the liquidators on the ground that the taking of the house in question was *ultrà vires*, the premises being much larger than the business of the company required, and that the company required and used only the ground floor, having let the rest, and thus were departing from their original objects, and superadding a house-letting speculation.

On the 22nd of February, the summons was argued in Court, and His Honour, Vice-Chancellor *Wood*, made an order giving leave to enter the claim for the whole estimated amount of future rent (1), in the terms of the order in *In re Haytor Granite Company* (2).

(1) On this occasion His Honour Vice-Chancellor *Wood* gave the following judgment:— (34 LJ 72)

It seems to me that the case is of a different character from that of *Simpson* v. *Westminster Palace Hotel Company* (2 D. F. & J. 141, 152; 8 H. L. C. 712) (2) in this respect, that it is a much stronger case in favour of the person who has demised his property. In *Simpson* v. *Westminster Palace Hotel Company* it might have been said (though I do not think it could have been said with effect, as the decision shews) that there was no absolute necessity for building so large a house, or laying out so large a sum of money.

The present case stands simply thus:—there is a company with power to carry on a particular business; they have power to "hire any offices or other buildings or premises for the business of the company, and generally, on behalf of the company, to enter into such contracts, agreements, and arrangements, and to make or take such purchases, leases, sales and dispositions, and for such considerations, on such terms, and in such manner and form as they may, rom time to time, think fit."

By the words "make or take leases," it is obviously intended to give to this company the power of making the best arrangements they can for carrying on their business in what they think the most effective manner. The directors in this case think (and the shareholders have sanctioned their view), that the best place for their business is this house in *Billiter Street*. It is, of course, idle for this or any other Court to take upon itself to inquire whether the shareholders are or are not competent to determine for themselves where they most like to carry on business. Being minded to carry on business in *Billiter Street*, they find the house a good deal larger than they want. The landlord, however, is not disposed to let a part of the house. He says: "There is the house; take it if you like, and hire the whole of it." They say: "It is too large for us, we do not want a house so large." But what would be the function of this Court if it were called upon, in a case of this description, where a company thinks it expedient to have a particular position for carrying on their business, to say to the company, "You must take care, what you must do is this: you must find a house that will just suit you." I suppose that Mr. *Hall* would

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(2) Law Rep. 1 Ch. 77, 81. 12 Jur N S 1.

(2) & (2) 6 Jur N S 765, 985.

After the date of the above summons, two dividends, of 7*s.* 6*d.* and 2*s.* 6*d.* respectively, on the creditors' debts were declared by the liquidators; and since the date of Vice-Chancellor *Wood's* order the liquidators had paid these two dividends. The present summons was thereupon taken out for liberty to distrain for rent actually due (which rent was provided for before the hearing of the summons) and also that the liquidators might be ordered to pay into Court, in trust in the matter, to the credit of "the account of the fund for securing the rent of No. 18, *Billiter Street*," the sum of £10,106 16*s.* 3*d.*, being the amount of the dividends of 5*s.* and 2*s.* 6*d.* in the pound on the sum of £26,951 10*s.*, the whole or total estimated amount of the rent reserved and payable under the lease, or such other sum as the Court might think fit, and that such sum might be invested, and the dividends accumulated; with liberty to the lessor and liquidators to apply respecting the application of the fund, as they might be advised.

The lease had not been assigned, and the house was still in the possession of the liquidators.

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not contend for such a proposition as that; he would not contend that if the first floor was not wanted, they must take a house where every floor in the house could be made useful; it would be monstrous in a metropolis like this to suppose that every one can always hit upon a house exactly of a size suited to him; that is what we are all frequently unable to accomplish.

It seems to me that this case entirely depends upon *bona fides.* If the company *bonâ fide* desire a house in *Billiter Street*, and can find there a house of the exact description they like; and if their *bonâ fide* object is to have their offices in the place they think most eligible, then the circumstance that a very large portion of the house may be let off, and is not wanted for purposes of business, cannot possibly make the matter *ultrà vires.* They have power to select what they consider the best house; this is exactly the house they consider the best, but it is more than they want, and being more than they want, they must make the best they can of the rest of it.

I will assume that the evidence will shew me that the landlord knew that they wanted his house *bonâ fide* for their business in that particular place, and that he knew it was a great deal too large for them, and that they would have to let off a large portion, although not the largest, because he said he should ask £1000 for the ground floor.

The whole thing comes to this: did they take this house for a speculation, in order to let it again, or for their business? That is the real question, and it can be answered only in one way. I do not, therefore, think the taking of this house was *ultrà vires.*

V.-C. G.
1868
In re LONDON AND COLONIAL COMPANY.
HORSEY'S CLAIM.

Mr. *Druce*, Q.C., and Mr. *W. F. Robinson* for the applicant:—

All we desire is, that the assets shall not be all dissipated before our rights are secured. The lease has not yet been assigned.

The principle upon which we calculate the amount is that of treating a contingent claim as a present liability, within the 158th section of the *Companies Act*, 1862. We ask to have the whole dividend impounded, and if it be shewn that too much has been impounded, there will be liberty to apply.

In the case of *In re Haytor Granite Company* (1) the judgment of the Master of the Rolls was reversed.

Mr. *C. Hall*, for the liquidators:—

The application is novel, and, if granted, will greatly embarrass the winding-up.

The *Haytor Company's Case* is conclusive against this application. The application to the Master of the Rolls, which was refused by him, was to be admitted to prove (2); and on the appeal the lessor was allowed to enter a claim, but not admitted to prove. He has his remedy by distress, and when the lease is assigned he will have the ordinary remedies against the assignee.

Independently of that, what is the right of the landlord, rent now due not being in question, and there being no suggestion of insolvency? Lord Justice *Knight Bruce* says (3), the Appellant is entitled to have the liability of the company preserved, "but so as to leave matters to the operation of the law, not affected by the mere circumstance of the winding-up." Now it was certainly no part of the contract that any fund should be set apart. In the case of administration under a decree of the Court, assets are never retained in respect of rent which may possibly become due: *King* v. *Malcott* (4).

This fund must be treated as if it had been all raised by a call under the direction of the Court, and the 102nd section of the *Companies Act* defines the purposes of a call to be "for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company."

(1) Law Rep. 1 Ch. 77. 12 Jur 251
(2) Ibid. 1 Eq. 11, 12. 11 Jur NS 809
(3) Law Rep. 1 Ch. 80. 12 Jur
(4) 9 Hare, 692.

Mr. *Druce*, in reply:—

The *Haytor Company's Case* (1) does not apply to this; for there the company was about to be dissolved; and the lease had been assigned.

By the 158th section, it is provided that "all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages," shall be admissible in proof.

Is this, or is it not a claim against the company? Putting it in the most unfavourable way against the lessor, as future and contingent, it is still capable of proof. If not, the lessor is left, not only without anything, but without the possibility of getting anything.

The analogy of administration is in favour of the claim. The only reason why an executor is set free, is because a lessor always has his rights, and can follow the assets. Here, the company are bound to make things safe, and prevent the necessity of a re-entry by the landlord.

Mar. 18. Sir G. M. Giffard, V.C.:—

This was a claim under the *Winding-up Act*, on a lease by Mr. *Horsey*, as lessor, against the *London and Colonial Company*.

A question as to whether the acceptance of this lease by the company was or was not *ultrà virès*, was argued before and disposed of by my predecessor; and on that occasion, if I am rightly informed, an order was made in form and substance similar to that which was made by the Lords Justices in the case of *In re Haytor Granite Company*.

The present claim is divided into two parts—the first, which is for liberty to distrain for rent actually due and unpaid, was not entered into before me, and that rent has been now provided for. The second is in these terms:—[His Honour read the latter part of the summons.]

Now, that which is asked by this second part is asked, not in respect of rent actually due and unpaid, but in respect of rent

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(1) Law Rep. 1 Ch. 77. 12 Jur N.S. 1,

16 Eq. 415.

hereafter to become due. It is obvious that such a claim is not within the terms of any contract in the lease; and, from the case of *King* v. *Malcott* (1), it is equally obvious that it can only be substantiated on the footing of some enactment to be found in the winding-up portion of the *Companies Act*, 1862. For that purpose the 158th section of that Act was insisted on. The opinion of the Master of the Rolls in the case of *In re Haytor Granite Company* (2) was plainly opposed to any such claim. It cannot be said to be supported by that of the Lords Justices in the same case (3), though it may be that their decision is not conclusive against it. There is no provision in the Act directing dividends to be set apart in respect of future or contingent claims; nor would this be a due course of administration; and it might perhaps be enough for me to say that, as this is all that is sought by the application, it is one which cannot be granted.

However, I do not desire to encourage a further application, and I will therefore refer to the section of the Act in question. Its terms are these:—[His Honour read the 158th section.]

From the terms of this section it follows, either that the claimant has a right to immediate proof and payment, or, inasmuch as he has been paid all arrears of rent which have accrued due since the winding-up, that he has no present right at all. I am of opinion that he is entitled to no present right at all; or, in other words, that the section does not apply to the case of a lessor who has the lease always as an absolute security—a continual remedy by distress—a remedy by re-entry if he desires it—who has been paid all the arrears of rent which have accrued due since the winding-up—and with respect to whom it must be said that the chances of any future breaches of covenant, or of there being or not being a sufficient distress, cannot be the subject of calculation.

It would be strange, too, if his proof should be admitted, and that such a proof and payment in competition with the other creditors should not be taken as a satisfaction of his remedies by covenant, distress, or re-entry—no matter what the amount of the dividend might be; and yet there is no provision in the Act providing for his giving up those rights, nor am I aware, as at present advised, that the Court could impose any such terms on him.

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(1) 9 Hare, 692.
(2) Law Rep. 1 Eq. 11. 11 Jur. N.S. 899
(3) Law Rep. 1 Ch. 77. 12 Jur. N.S. 1.

On the whole, I do not think that the enactment in question was intended to apply to such a case as the present. I therefore dismiss the second part of the claim, but without prejudice to any application at any time in respect of any rent actually due and unpaid, and also without prejudice to any application in the event of any return of assets being asked for by, or being about to be made to, the shareholders.

The liquidators' costs of this application will come out of the estate; and as the first part of the summons was in respect of rent which was in arrear at the time when the summons was taken out in Chambers, although it has been since paid, I shall not make the applicant pay any costs.

Solicitors for the Applicant: Messrs. *Druce, Sons, & Jackson.*

Solicitors for the Liquidators: Messrs. *Gregory, Rowcliffes, & Rawle.*

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Held, that having regard to the four months' interval between the application for shares and the allotment to him, *A.* was entitled to a *locus pœnitentiæ*, and that it was not too late for him on the 7th of February (assuming him to have received the letter of allotment on the 3rd) to reconsider the matter and repudiate the shares.
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ADVANCEMENT—*Mother and Daughter.*] A widowed mother, after making her will in favour of her two daughters, transferred *East India* stock, which had stood in her own name, into the names of herself and the unmarried daughter, and died:—

Held, that there was a presumption of intended benefit to the unmarried daughter which was unrebutted, and that the stock belonged absolutely to her.

SAYRE *v.* HUGHES 376

ADVERSE POSSESSION—Statute of Limitations—Acts of ownership—Site of ditch 409
See LIMITATIONS, STATUTE OF. 3.

AGENT—Successive pledges under Factors Act 140
See FACTORS ACT.

AIR, POLLUTION OF—Delicate manufacture—Nuisance 166
See TRADE NUISANCE.

"ALL THE REST OF MY ESTATE"—*Real Estate held to pass.*] A testator, by will, in 1808, after making specific bequests of freehold and leasehold estate, gave certain specific chattels, and bequeathed as follows:—"I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death," to trustees, "their executors, administrators, and assigns," upon trust for sale. He then made a bequest of his ready money, money arising from sale of lands, securities for money, and all sums due to him at his decease.

Testator was, at the date of his will, and at the time of his death, seised of certain freehold estate, which he did not mention in his will:—

Held, that such freehold estate passed by the words "all the rest of my estate."

The decisions in *Sanderson* v. *Dobson* (1 Ex. 141; 7 C. B. 81) observed upon.

DOBSON *v.* BOWNESS 404

ALTERATION OF STATUS under sect. 153 of Companies Act, 1862 420
See LOAN OR PAYMENT UPON SHARES.

ALTERNATIVE RELIEF—*Principal and Agent—Inconsistent Allegations—Solicitor and Client.*] A contract having been entered into by a firm of solicitors acting on behalf of their client, to pay the Plaintiff certain sums of money, the Plaintiff filed his bill against the client and the solicitors, alleging that the client was bound by the contract, but that the client denied that he was so bound, on the ground that the solicitors had no authority to enter into such contract; and the bill prayed specific performance by the client; or otherwise, if it should appear that the solicitors were not authorized, then that the solicitors themselves might be declared personally liable to perform the same.

A demurrer to the bill by the solicitors was allowed on the ground that the Plaintiff did not himself allege that the client was not bound, and, also, that alternative relief could not be prayed against one Defendant in case relief could not be obtained against another Defendant.

CLARK *v.* LORD RIVERS 91

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AMALGAMATION *of Companies under Powers in Articles—Companies Act,* 1862, *s.* 161—*Ultrà Vires—Charges of Fraud—Costs.*] Company *A.* was registered in December, 1863, for undertaking financial operations; by the articles it was stipulated that the limitation of the liability of shareholders should be unalterable; and power was given to the directors "to amalgamate with, or purchase, or acquire" the business and property of any company formed to carry on any business included in the objects of company *A.* Company *B.* was registered in December, 1864, with the object of carrying on banking and financial operations, and "any further objects which the company might from time to time adopt." In March, 1865, an agreement was come to between the respective directors for the amalgamation of the two companies, upon the terms that the shareholders of company *A.* were to be bound to take 25,000 shares of company *B.* at £6 per share to be credited as £5), such sum of £150,000 to be paid for out of the assets of company *A.*, and if they were insufficient, by a call on the shareholders of company *A.* By resolutions passed at an extraordinary general meeting of company *A.*, held in April, 1865, it was resolved that the amalgamation should be effected, pursuant to the terms of the agreement, and that company *A.* should be wound up:—

Held, that such attempted amalgamation was not within the powers of the directors of company *A.*, either under their articles, or under the 161st section of the *Companies Act,* 1862.

Observations on the scope and object of the 161st section.

The Plaintiff, a shareholder in company *A.*, first complained of the proposed arrangement in June, 1865. In September, 1865, notice of the registration of certain shares in company *B.*, under the arrangement, was first sent to the Registrar of Joint Stock Companies. The Plaintiff filed the bill on the 10th of November, 1865:—

Held, that the Plaintiff was not too late in coming to have the arrangement set aside; and that he was competent to sue on behalf of all the other shareholders (though some were assenting), to have a transaction set aside which was *ultrà vires.*

The Plaintiff having made several allegations of fraud, some of which he was held to have established, others to have failed in establishing, and none being, in the event, necessary to have been alleged in order to establish his claim for relief:—

Held, that he was justified in stating, as part of the narrative, the fraudulent transactions which he had proved; and that he was entitled to his costs as to those parts of the suit; but that he must pay the costs occasioned by the charges which had failed.

To a bill charging fraud, Defendants severing and not opposing the Plaintiff's case, are entitled, if the Plaintiff's case succeed, to their costs of separate answers.

CLINCH *v.* FINANCIAL CORPORATION 450

AMBIGUITY.—Identification 527
See TRUSTEE ACT.

APPOINTMENT.—Implied gift 346
See IMPLIED GIFT.

——— Interim income whether included 311
See INTERIM INCOME.

——— Settlement on object of power and children 44
See ELECTION.

ASSETS—Following, by legatee not party 99
See FOLLOWING ASSETS.

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ASSETS IN WINDING-UP, *Distribution of—Preference Shareholders.*] Upon the formation of a company for working certain patents, the A shareholders contributed all the capital, and the B shareholders received paid-up shares as a consideration for the patents and the premises on which they were worked. The A shareholders were to receive out of the profits the whole amount of their capital with interest at £7 10*s.* per cent. before the B shareholders could participate in the profits:—

Held, upon the winding-up of the company, no profits having been realized, that there being a provision only for preferential dividend, and no provision as to the division of capital upon breaking up, that the surplus assets must be distributed between both classes of shareholders *pro râta*, without reference to their rights in respect of dividend.
In re LONDON INDIA RUBBER COMPANY 519

——— Application under winding-up after creditors' deed 223
See WINDING-UP AFTER CREDITORS' DEED.

ASSIGNEE—Insolvency—Notice—Priority 88
See NOTICE TO TRUSTEE.

ASSIGNMENT.—Notice to trustee, what sufficient 88
See NOTICE TO TRUSTEE.

ASSIGNMENT OF DEBT OF COMPANY.—Notice to liquidator .. 284
See NOTICE OF ASSIGNMENT.

BANK-LETTER OF CREDIT—*Suspension of Payment by the Bank not a Breach of Contract—Claim for Damages in Winding-up disallowed.*] Where a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading to a like amount, suspension of payment by the bank before there has been time for the letter of credit to be used, is not a breach or repudiation of contract; inasmuch as permission might have been given to the liquidators under the winding-up to negotiate the bills; and claim by the holder of the letter of credit, under the *Companies Act*, 1862, for damages for the alleged breach, disallowed.
In re AGRA BANK. *Ex parte* TONDEUR 160

BANKRUPTCY—Creditors' deed followed by winding-up—Assets—Dividend 223
See WINDING-UP AFTER CREDITORS' DEED.

——— Forfeiture clause—Creditors' deed—Inspectorship deed not a forfeiture 35
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——— Order and disposition—Assignment of debt of company—Notice to liquidator 284
See NOTICE OF ASSIGNMENT.

BILL OF EXCHANGE, Rectification of—Mistake 131
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BONUS—Capital or income—Paid-up shares issued out of profits .. 238
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See Limitations, Statute of. 4.

———— Trustee also *cestui que trust* 276
See Limitations, Statute of. 2.

CALL—No set-off of debt payable *in futuro* against 286
See Set-off of Debt payable in Futuro against Call.

CALLS, Interest on, after forfeiture 6
See Interest on Calls.

CAPITAL AND SHARES, reduction of—Form of order under 30 & 31 Vict. c. 131 155
See Reduction of Capital and Shares.

CASES:—

Brereton v. *Hutchinson* (2 Ir. Ch. Rep. 648) not followed 545
See Limitations, Statute of. 4.

Dunne v. *Doran* (13 Ir. Eq. Rep. 545) not followed 545
See Limitations, Statute of. 4.

Moriarty v. *Martin* (3 Ir. Ch. 26) observed upon 44
See Election.

Reese River Company, In re. Smith's Case (Law Rep. 2 Ch. 604) followed 249
See Misrepresentation in Prospectus.

Robinson v. *Shepherd* (10 Jur. (N.S.) 53) not followed 51
See Descendants "per Stirpes and not per Capita."

Sanderson v. *Dobson* (1 Ex. 141; 7 C. B. 81), observations on .. 404
See "All the Rest of my Estate."

CERTIFICATE—Costs—Private Bill Costs Act—Injunction 444
See Private Bill Costs Act.

"CHARITIES AND OTHER PUBLIC PURPOSES IN THE PARISH OF *T.*"—*Charity—Legacy.*] Bequest of pure personalty for "such charities and other public purposes as lawfully might be in the parish of *T.*":—

Held, a good charitable gift.
Dolan *v.* Macdermot .. ..

CHARITY—Gift to charities and other public purposes in *T.* 60
See "Charities and other Public Purposes in the Parish of *T.*"

CLAIM OF LESSOR FOR FUTURE RENT—*Winding-up—Lease—Dividend.*] After a lessor of premises to a company, now in liquidation, had obtained leave to enter a claim for the amount at which the future rent was estimated, in the terms of the order in the case of *In re Haytor Granite Company* (Law Rep. 1 Ch. 77, 81), a dividend was paid by the liquidators:—

Held, that the lessor was not entitled to have a sum equal to the dividend upon the amount at which the future rent was estimated, impounded, to secure payment of the future rent; and summons for that purpose, dismissed.
In re London and Colonial Company. Horsey's Claim .. 561

CLASS—When ascertained 346
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CLUB—*Expulsion of Member by General Meeting—Bonâ fide Exercise of Power to remove—Jurisdiction.*] The rules of the *Conservative Club* authorized the committee to call a general meeting "in case any circumstance should occur likely to endanger the welfare and good order of the club," and provided that any member might be removed by the votes of two-thirds of the persons present at such meeting. On a bill filed by a member so removed praying to be re-instated in his rights as a member of the club:—

Held, that, as in the judgment of the Court the meeting was fairly called and the decision arrived at *bonâ fide* and not through caprice, such decision was final, and that the Court had no jurisdiction to interfere.

Hopkinson *v.* Marquis of Exeter 63

COMPANIES CLAUSES ACT, ss. 39, 40—Re-borrowing powers .. 316
See Re-borrowing, Power of.

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See Amalgamation.

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——— Bankruptcy—Order and disposition—Assignment of debt of company—Notice to liquidator 284
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——— Claim for future rent in winding-up 561
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——— Delay in allotment—*Locus pœnitentiæ* 428
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——— Delay in registration—Responsible transferee 9
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——— Misrepresentation in prospectus—*Scienter*—Leave to proceed after winding-up 249
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———, Railway.
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——— Reduction of capital and shares—Form of order under 30 & 31 Vict. c. 131 155
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——— Return of deposit without correction of register—Contributory 118
See RETURN OF DEPOSIT.

——— Rights of preference shareholder in winding-up 519
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——— Scripholder not a contributory 110
See SCRIPHOLDER.

——— Transfer not executed by transferee—Contributory 193
See CUSTOM OF STOCK EXCHANGE. 2.

——— Unregistered, for mutual insurance—Contributory 368
See UNREGISTERED COMPANY.

——— Winding-up after execution of creditors' deed—Assets—Dividend 223
See WINDING-UP AFTER CREDITORS' DEED.

COMPULSORY ENTRY ON LAND—*Lands Clauses Act, s.* 85—*Railway Companies Act*, 1867, *s.* 36—*Deposit Money, Amount of.*] A railway company cannot avail itself of the power of entering on land before purchase conferred by the *Lands Clauses Consolidation Act*, 1845, unless there is an urgent necessity for immediate entry.

The deposit provided to be paid into Court by the 85th section of the *Lands Clauses Act*, 1845, on entry before purchase, must include not only the value of the land, but also compensation for severance, &c., to which the landowner would be found entitled by a jury, or on arbitration.

An entry subsequent to the *Companies Act*, 1867, cannot be made upon a previous valuation under the *Lands Clauses Act*, 1845.

Therefore, where a railway company had valued the land only, under the 85th section, in 1865, and had entered after the 20th of August, 1867, on depositing the amount of the valuation:—

Held, that the entry was irregular, and injunction granted restraining the company from continuing in possession of the land until the proper deposit had been made.
FIELD *v.* CARNARVON AND LLANBERIS RAILWAY COMPANY .. 190

COMPULSORY POWERS—Time for exercising under Lands Clauses Act 352
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CONS. ORD. XXXI., rule 1 435
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See DISMISSAL FOR WANT OF PROSECUTION. 1.

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CONTINGENT REMAINDER.] Devise to *A.* (testator's widow) for her life, chargeable with the payment of £15 yearly and every year during his life unto testator's grandson *B.* (who was his heir-at-law) and to his children equally after his death; "and as to my said real estates, after the death of *A.* I devise the same equally to the child or children of *B.*, if he leave any him surviving; but in case he leave no child or children him surviving, I devise my said real estates unto the child or children of my cousin *C.*"

At the death of *A.*, *B.* had three children living, and two had since been born to him:—

Held, that the gift to *B.*'s children was contingent during his lifetime, and failed by the dropping of *A.*'s life estate in his lifetime, and that consequently *B.* was entitled as heir-at-law.

PRICE *v.* HALL 399

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CONTRIBUTORY ABSCONDING—Process against absconding contritory 264
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COSTS—Fraud charged—Company 450
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——— Lands Clauses Act—Title—Administration 282
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——— Winding-up—Application for leave to proceed 249
See MISREPRESENTATION IN PROSPECTUS.

COTTON MILL—Fixtures 72
See FIXTURES.

COURT ROLLS, *Covenant for Production of—Covenants for Title by Tenant for Life—Freehold Lands of Manor.*] Where trustees of a

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settlement of real estate are empowered to sell by the direction of the tenant for life, upon a sale in pursuance of the power the tenant for life must enter into the ordinary covenants for title.

A lord of a manor selling freehold lands of the manor subject to leases for lives granted by copy of Court roll must covenant to produce the Court rolls up to the date of the conveyance.

EARL POULETT *v.* HOOD 115

COVENANT FOR PRODUCTION—Court rolls 115
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COVENANTS FOR TITLE—Tenant for life 115
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CREDITOR, Examination of, in winding-up 22
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CREDITORS' DEED—Inspectorship deed not within a clause of forfeiture on insolvency 35
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———————, Winding-up after execution of—Assets—Dividend 223
See WINDING-UP AFTER CREDITORS' DEED.

CROWDS, Disorderly—Nuisance—Injunction 25
See NOISY CROWDS.

CUSTOM OF STOCK EXCHANGE—*Non-registration of Transfer through accidental Delay of Transferee—Discretion of Directors—Specific Performance—Indemnity.*] *A.* sold to *N.*, a stock-jobber, and *B.* purchased from *N.*, five shares in a joint stock company. According to the practice of the *Stock Exchange*, *N.* gave to *A.* the name of *B.* as the purchaser; and a transfer of the shares from *A.* to *B.* was executed by *A.* and *B.*, and the purchase-money was paid by *B.* to *A.*; but *B.* was prevented by accidental absence from home from sending the transfer for registration until after the company had stopped payment. The company was wound up, and the liquidators registered all transfers left at the office before the company stopped payment, but refused to register the transfer from *A.* to *B.*, and *A.* was made a contributory, and paid a call on the shares:—

Held, that *A.* was entitled to a decree against *B.* for repayment of the call, and indemnity against future liability in respect of the shares.

Where directors of a company had a discretionary power of refusing to register transfers if they disapproved of the transferee, and a transfer, executed before, was not left for registration until after the commencement of the winding-up of the company:—

Held, that in the absence of evidence that the transferee was objectionable, it would be presumed that the directors would have registered the transfer.

EVANS *v.* WOOD 9

2. ——————————— *Rectification of Register—Transfer not executed by Transferee—Contributory—Costs of Liquidator.*] If *A.* sells shares in a company to a member of the *Stock Exchange*, and *B.* buys shares in the same company at a different price from another member of the *Stock Exchange*, and on the name-day *B.'s* name is given to *A.* as the purchaser of *A.'s* shares, and *A.* executes a transfer of his shares to *B.*, and *B.* accepts the transfer, and pays to *A.* the price for which *B.* originally bought the shares, the transaction constitutes a contract between *A.* and *B.* for the sale and purchase of

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the shares, which a Court of Equity will compel *B.* specifically to perform.

Where the articles of association of a company require transfers of shares to be executed by both parties, the Court has no power, under ss. 35 and 98 of the *Companies Act*, 1862, to rectify the register by removing the name of a transferor, unless the transfer has been executed by the transferee.

When in the winding up of a company application is made to the Court to substitute one person for another on the list of contributories, and both parties are equally solvent, so that it is a matter of indifference to the creditors and contributories which of them is made a contributory, it is the duty of the liquidator to appear by one counsel only, and to take no part in the argument:

Semble, in such cases the unsuccessful party will be ordered to pay the costs of the liquidator.

In re OVEREND, GURNEY, & CO. MUSGRAVE AND HART'S CASE. 193

3. CUSTOM OF STOCK EXCHANGE—*Non-registration by Transferee—Specific Performance—Indemnity—Companies Act*, 1862, *s.* 35—*Form of Decree.*] On the instructions of *W.* shares in a company, subsequently wound up, were purchased for him by a broker, who, on the settling-day, also on the instructions of *W.*, gave the name of *G.* as the purchaser, and the deeds of transfer were made out in *G.'s* name and delivered to him for execution, and he, for some time, retained possession of and dealt with them. *W.* informed *G.* that he had passed his name as transferee, and had also passed a cheque on the company's bankers for the purchase-money to the debit of his firm. *G.* took no step to inform the vendor that he did not assent to the contract, though he did express his dissent to *W.* :—

Held, that the vendor was entitled to a decree for specific performance against *G.*

Form of decree.

Quære, whether the 35th section of the *Companies Act*, 1862, does not apply to a case of delay on the part of a transferee in procuring registration.

Shepherd's Case (Law Rep. 2 Ch. 16) discussed.

SHEPHERD *v.* GILLESPIE 293

DAMAGES, MEASURE OF, *for Infringement—Patent.*] A patentee of an invention applicable to part of a machine who, himself a manufacturer, has been in the habit of licensing the use of his invention by other manufacturers on payment of a fixed royalty for each machine, having obtained against an infringing manufacturer a decree (amongst other things) for damages, "by reason of the user or vending" of the invention, is not entitled to claim, by way of damages, any sum beyond the ordinary royalty.

Hence he is not entitled to claim, in addition to his ordinary royalty, a manufacturing profit; and, *à fortiori*, not such a manufacturing profit as he would have made if every unlicensed machine had been sent to him to be fitted with the invention.

Secus, if he had been in the habit of charging infringers with a higher royalty than ordinary licensees.

The Plaintiff having, in another suit, obtained a decree against certain wrongful users (not being manufacturers) of unlicensed machines fitted by the Defendant with his invention, had in some instances been paid his ordinary royalty by such users :—

Held, that, in every such instance, no further royalty was payable by the manufacturer.

PENN *v.* JACK 81

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See BANK LETTER OF CREDIT.

DELAY—Time for exercising compulsory powers 352
See NOTICE TO TREAT.

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See CUSTOM OF STOCK EXCHANGE. 3.

——————— Transfer 9
See CUSTOM OF STOCK EXCHANGE. 1.

DESCENDANTS "PER STIRPES AND NOT PER CAPITA"—*Construction.*] Bequest to the descendants of the brothers and sisters of *A.* living at testator's death, "such descendants to take as tenants in common *per stirpes*, and not *per capita*":—

Held, that the fund was primarily divisible into as many equal shares as there were brothers and sisters of *A.* of whom any descendant was living at testator's death; that such shares respectively were divisible into as many equal shares as there were children of such brothers and sisters of *A.* respectively living at testator's death, or having died and left any descendant then living; that the same principle was to be applied to every sub-division, and that no descendant was entitled to any share concurrently with a living ancestor.

The case of *Robinson* v. *Shepherd*, before Lord *Westbury* (10 Jur. (N. S.) 53), not followed.

GIBSON *v.* FISHER 51

DIRECTORS—Discretion as to registration—Presumption—Responsibility 9
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DISCRETION—Club—Power to expel members 63
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DISCRETION OF DIRECTORS—Registration—Presumption—Responsibility 9
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——————————————— 219
See IRRESPONSIBLE TRANSFEREE.

DISMISSAL FOR WANT OF PROSECUTION—*Time—Vacation excluded—Cons. Ord.* XXXIII., *Rule* 10—*Cons. Ord.* XXXVII. *Rule* 13.] A Defendant is not entitled to move to dismiss for want of prosecution until the expiration of four weeks (excluding vacations) from the time when the answer is deemed sufficient.

LEITE *v.* JOHNSTON 266

2. ——————————— *Plea—Replication—Subpœna to hear Judgment—Cons. Ord.* XXI., *Rule* 1; *Cons. Ord.*

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xxxiii., *Rule* 10.] Where a Defendant has filed a plea as to part, and an answer as to the rest of the bill, and the Plaintiff has filed a replication to the plea, the suit is "a cause" within the meaning of Rule 1 of Cons. Ord. xxi., and of Rule 10 of Cons. Ord. xxxiii., which empowers a Defendant, in the cases therein specified, to move to dismiss the bill for want of prosecution.

Herbert *v.* Barrett 435

DITCH, Site of—Acts of ownership—Statute of Limitations 409
See Limitations, Statute of. 3.

DOCUMENTS—Inspection of, impeached—Documents before decree .. 290
See Inspection by Witnesses.

DOMICIL OF TESTATOR, English—Executors in *England*—Injunction against foreign suit 175
See Foreign Suit.

ELDEST SON *entitled in Remainder, exclusion of, from Gift—Eldest Son born after Forfeiture of Estate, not excluded.*] A testatrix devised an estate at *T.* to *J.* for life, with remainders to the sons and daughters of *J.* successively in tail, with remainders over, and with a proviso that if any tenant for life or in tail in possession should neglect to reside on the *T.* estate for six months, the estate of him and of the issue of his body should thenceforth cease, and the *T.* estate should go to the person next entitled in remainder, as if the person so neglecting to reside were then dead without leaving issue; and she bequeathed her residuary personal estate in trust for the children of the person who should at her death become tenant for life of the *T.* estate (other than and besides an eldest or only son or an eldest daughter for the time being entitled in tail in remainder expectant on the death of his or her parent to the *T.* estate) who should attain twenty-one or marry, and if there should be but one child besides such eldest or only son or eldest daughter for the time being entitled as aforesaid, then in trust for that one child, with a gift over in case there should be no such child, or all such children should die before any of them should attain a vested interest.

J. survived the testatrix, neglected to reside on the *T.* estate for six months, and died leaving a posthumous son, *D.*, who was his only child:—

Held, that as *D.*, by reason of the forfeiture incurred by *J.* before his birth, never was tenant in tail in remainder of the *T.* estate, he was entitled to the residuary personal estate, and that being an only child he took a vested interest at his birth.

Johnson *v.* Foulds 268

ELECTION—*Power—Appointment to Objects of Power with superadded Restriction in excess of Power—Gift of other Property to Appointee.*] A testator, in exercise of a special power, appointed a fund to his three daughters, who were objects of the power, their executors, administrators, and assigns, in equal shares, and he gave his residuary personal estate to the same daughters in equal shares, and he directed the share to which each daughter should become entitled under his will and the appointment to be held in trust for the daughter for life, with remainder for her children, who were not objects of the power:—

Held, that the daughters took absolute interests in the appointed fund, and that no case of election was raised against them in favour of their children.

Observations upon *Moriarty* v. *Martin* (3 Ir. Ch. 26).

Churchill *v.* Churchill 44

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ELEGIT, Prior—Sale in satisfaction of judgment 413
See JUDGMENT CREDITOR.

ERRONEOUS BELIEF OF TESTATOR—*Will—Construction.*] Testator, by will, dated in 1849, bequeathed the interest of a fund to *Charlotte Lee*, " but in case the said *Charlotte Lee* should marry, or die unmarried," the fund was to go over. *Charlotte Lee* was the maiden name of testator's daughter, who had been married in 1828; and it was found that the testator knew of her marriage, but that it could not be shewn under what circumstances he knew it. It also appeared that *Charlotte's* husband had in 1849 not been heard of for many years. After the testator's death the husband appeared, and on the death of *Charlotte* claimed the fund:—

Held, that the circumstances were sufficient to shew that the testator in 1849 believed his daughter's husband to be dead, and that he intended that no husband of hers should have the benefit of the fund; and, accordingly, that on her death it passed by the gift over.
CROSTHWAITE *v.* DEAN 245

ESTATE—" All the rest of my estate," after specific bequests — Real estate passed 404
See " ALL THE REST OF MY ESTATE."

EVIDENCE, *Vivâ voce*, at hearing—Issues when directed 437
See ISSUES.

EVIDENCE DISCOVERED AFTER EVIDENCE CLOSED—*Subsequent Discovery of material Witness*—15 & 16 *Vict. c.* 86, *s.* 38.] After evidence is closed the Court will not, under sect. 38 of 15 & 16 Vict. c. 86, allow new evidence to be received on the ground that a material witness has since been discovered, whose evidence the party who desired that the affidavit of such witness should be filed had no previous means of knowing to be obtainable.
THEXTON *v.* EDMONSTON 373

EXAMINATION OF WITNESS IN WINDING-UP—*Companies Act*, 1862, *s.* 115—*Creditor of Company.*] A mere creditor of a company in liquidation, who is not shewn to be capable of giving the information referred to in the 115th section of the *Companies Act*, 1862, is not a person to be examined under that section.
In re ACCIDENTAL AND MARINE INSURANCE CORPORATION .. 22

EXCESS OF POWER—Appointment to object of power — Restriction —Settling share 44
See ELECTION.

EXECUTION FOR COSTS AGAINST LIQUIDATORS—*Actions by Voluntary Liquidators—Companies Act*, 1862, *ss.* 87, 163.] Where an action brought by liquidators appointed in a voluntary winding-up under supervision fails, execution by the Defendant for costs will not be restrained.

The 163rd section of the *Companies Act*, 1862, is qualified by the 87th.
In re BANK OF HINDUSTAN, CHINA, AND JAPAN. *Ex parte* LEVICK AND OTHERS 69

EXECUTORY SETTLEMENT, Execution of—Tenancy in common .. 150
See TENANCY IN COMMON.

EXPERT—Inspection of impeached documents by 290
See INSPECTION BY WITNESSES.

EXPULSION FROM CLUB—Jurisdiction to restrain 63
See CLUB.

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FACTORS ACT (5 & 6 *Vict.* c. 39)—*Successive Pledges by Factor.*] A factor by pledging goods in his possession or under his control, as agent, for an amount which does not exhaust their value, has not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value, which shall be valid as against the principal under the Factors Acts.

Cotton was consigned for sale by *A.* to *B.* *B.* deposited the bill of lading with *C.*, a broker, and authorized him to receive and sell the cotton, and subsequently made a further pledge to *D.* of the balance of the net proceeds of the cotton by order in writing communicated to and assented to by *C.* :—

Held, that the pledge to *D.* was valid as against *A.* under the *Factors Act* (5 & 6 Vict. c. 39).

PORTALIS *v.* TETLEY 140

FIREWORKS—Nuisance—Injunction 25
See NOISY CROWDS.

FIRM OF SOLICITORS—*Liability of One for Money received by Copartner—Misrepresentation—Money-Bill—Jurisdiction.*] The Plaintiff being entitled to a share in a fund in Court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money from the Accountant-General. The Plaintiff was in the habit of addressing his letters to *B.*, one of the partners, individually, and not to the firm, and he sent the power of attorney addressed to *B.*, who, under it, received the money, and signed the receipt in his own name. *B.* paid the money into his own private banking account, and shortly afterwards absconded with it. Upon bill, seeking to make *S.*, the other partner, liable to repay the money to the Plaintiff, but not praying for an account :—

Held, that although the Plaintiff corresponded with *B.* alone, he, in fact, employed the firm ; that the money, as soon as it came into the hands of *B.*, must be treated as in the hands of the firm ; that it was received by them in the ordinary discharge of their duty as solicitors ; that there was jurisdiction in equity although there might be concurrent jurisdiction at law ; and decree against the Defendant, *S.*, for repayment of the amount to the Plaintiff, with interest.

ST. AUBYN *v.* SMART 183

FIXTURES—*Assignor and Assignee—Cotton Mill—Pegged Looms—Bills of Sale Act* (17 & 18 *Vict.* c. 36).] Looms put up by the lessee of a cotton mill for his convenience during the existence of his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor, are, though easily moveable without injury to the freehold, fixtures which will pass under an assignment of " the mill, fixed machinery, and hereditaments, with all looms and other machinery, fixed or moveable," without the necessity of registering the assignment as an assignment of chattels under the *Bills of Sale Act* (17 & 18 Vict. c. 36).

BOYD *v.* SHORROCK 72

FOLLOWING ASSETS *by Legatee not a Party—Residuary Legatee —Jurisdiction.*] In a suit by a residuary legatee for the administration of the testator's estate, the Court has jurisdiction to compel the residuary legatee to refund, for the purpose of paying the legacy of a legatee who is not a party to the suit, assets paid to the residuary legatee by the executor before the suit.

PROWSE *v.* SPURGIN 99

FOREIGN SUIT—*Testator domiciled in England—Proceedings in Scotland against his Executors—Injunction.*] A testator domiciled in *England* gave his real and personal property, situate in *England* and

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Scotland, to be divided between two of his sons, and appointed his three sons executors. The will was proved in *England* by two of the sons. At the death of the testator the other son, one of the residuary legatees, was indebted to an insurance company carrying on business in *Scotland* and *England*, who obtained judgment in an action in *Scotland* against such son, and proceeded in *Scotland* against the executors to arrest the amount in their hands, to which the indebted son was entitled. The Court, upon the executors undertaking to obtain forthwith an administration decree in *England*, granted an injunction to restrain the proceedings in *Scotland* against the executors.

BAILLIE *v.* BAILLIE 175

FORFEITED SHARES—Interest on calls after forfeiture 6
See INTEREST ON CALLS.

FORFEITURE CLAUSE *on Bankruptcy or Insolvency—Inspectorship Deed—Bankruptcy Act*, 1861, *s.* 192.] A testator gave certain property to trustees to divide between his children, to transfer the shares of sons to them absolutely at twenty-one, and to pay the interest of the daughters' shares to them for life, and after the decease of each of his daughters, if she should leave a husband surviving, upon trust to pay the interest to her husband during his life, or until he should become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, and after the decease of such husband, or his bankruptcy or insolvency, then for the children of the marriage. And the will contained a proviso as to the sons' shares in certain residuary property, that in case either of them should, before his share became payable, assign, charge, or otherwise dispose of, the whole or any part of such share by way of anticipation, or become bankrupt, or take the benefit of any Act for the benefit of insolvent debtors, or do anything whereby such share should become vested in some other person, then the same was to go over. A daughter of the testator married and died, leaving a husband, who executed a deed of inspectorship under the *Bankruptcy Act*, 1861:—

Held, that the son-in-law had not brought himself within the clause of forfeiture, the meaning of which, as explained by the similar clause affecting the shares given to sons, was that such an act should be done as would cause a *cessio bonorum*.

MONTEFIORE *v.* ENTHOVEN 35

FRAUD, CHARGE OF—Costs—Separate answer 450
See AMALGAMATION.

FRAUDS, STATUTE OF—Identification by parol 527
See TRUSTEE ACT.

FUTURE RENT—Claim in winding-up 561
See CLAIM OF LESSOR AS FOR FUTURE RENT.

GARNISHEE, DEBTOR TO COMPANY, *Proceedings against—Winding up—Companies Act*, 1862, *s.* 163—*Injunction.*] *H.* recovered judgment against a company, and afterwards obtained a garnishee order against *S.*, an alleged debtor to the company, who subsequently denied that he was indebted to the company. *H.* then, by leave, brought an action against *S.*, and pending the proceedings the company was ordered to be wound up, and a liquidator was appointed.

A motion by the liquidator for an injunction to restrain the proceedings at law was refused, but it was ordered that in case *H.* should recover a verdict he should not put in force any execution against the estate of the company in the hands of *S.*

In re UNITED ENGLISH AND SCOTTISH LIFE INSURANCE COMPANY 300

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GUARDIAN under Settled Estates Act 334
See SETTLED ESTATES ACT.

HEIR OF TESTATRIX—Unknown heir—Sole trustee pre-deceasing testatrix—Trustee Act 332
See SOLE TRUSTEE PRE-DECEASING TESTATRIX.

ILLEGITIMATE CHILDREN *not designated by the Words "Next of Kin" of another illegitimate Child.*] A testator, who had none but illegitimate children, by his will, made five months before his death, devised and bequeathed all his real and personal estate to trustees, upon trust, on the arrival of a future event, to sell the realty, and to divide the residue of the proceeds and of the personalty into four parts, and pay one to his son *J.*, and if his said son should die under twenty-one, and should not leave any child who should attain twenty-one or marry, the share was to be held in trust for such persons as would at his son's decease be his "next of kin" under the *Statute of Distributions.* Testator directed another share to be held upon certain trusts for the benefit of his daughter *A.* (a married woman), her husband, appointees, and children; and if she should leave no child or issue who should become entitled, he directed the share to be paid or assigned to such persons as would, at *A.*'s death, be her "next of kin" under the *Statute of Distributions* in case she had died intestate and unmarried. He directed the third and fourth shares to be held upon similar trusts for the benefit of his two other daughters, *H.* and *E.* respectively, then unmarried, their husbands, appointees, children, and next of kin. He then provided that any shares or moneys to which any or either of his said three daughters should become entitled "by virtue of the provisions hereinbefore contained, as next of kin of the others or other of them," or of his son, should be held upon the like trusts as the original shares.

The daughter *H.* having married, and died, without having had a child, and without having made any appointment, and her husband being also dead:—

Held, that the phrase "next of kin" of *H.* could not be read as designating the surviving illegitimate children of the testator, and that there was an intestacy as to the share of *H.*

In re STANDLEY'S ESTATE 303

IMPLIED GIFT *in default of Appointment—Power—Class, when ascertained—Joint Tenancy or Tenancy in common.*] A testator gave £3000 to his executors upon trusts for the benefit of *M.* during her life, and from and immediately after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage." The executors died in the lifetime of *M.*:—

Held, that the children of *M.* who were living at the time of her death were entitled to the fund in equal shares as tenants in common.

In re PHENE'S TRUSTS 346

INCOME, Interim, of appointed fund 311
See INTERIM INCOME.

INCOME OR CAPITAL—*Tenant for Life and Remainderman—Bonus—Dividend—Capitalizing Profits—New Shares.*] Shares in a company were settled upon trust to pay *A.* during her life "the interest, dividends, share of profits, or annual proceeds," and after her death in trust for her children.

The deed of settlement of the company provided that, by the vote

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of the majority, out of the half-yearly profits a dividend might be declared, and a sum reserved for such contingencies as the directors should specify.

During *A.'s* lifetime an addition of three new fully paid-up shares to those already held in trust for her was made, pursuant to a resolution passed at a general meeting of the company to apply a portion of "the net earnings during the half-year" to necessary works, and issue new shares to represent the money so applied, a dividend being declared out of the remaining portion of the earnings:—

Held, that these new shares were capital, and not income, as between the tenant for life and those entitled in remainder.

In re EZEKIEL BARTON'S TRUST 238

INDEMNITY—Purchaser of shares 9, 293
See CUSTOM OF STOCK EXCHANGE. 1, 3.

INFANT—Guardian under Settled Estates Act 334
See SETTLED ESTATES ACT.

INFRINGEMENT of patent—Measure of damages 81
See DAMAGES, MEASURE OF.

INJUNCTION—Nuisance—Crowds—Fireworks—Music 25
See NOISY CROWDS.

———— Trade nuisance—Delicate manufacture 166
See TRADE NUISANCE.

INSOLVENCY—Inspectorship deed when not 35
See FORFEITURE CLAUSE.

————, Notice of—What sufficient to give priority 88
See NOTICE TO TRUSTEE.

INSPECTION BY WITNESSES—*Impeached Documents—Production before Decree.*] A Plaintiff suing as transferee of a mortgage ordered, before decree, to produce for the inspection of the Defendants' witnesses, before making their affidavits, his transfer deed, the validity, but not the genuineness, of which was denied by the answer, but which the Defendants' solicitor suspected to be forged.

BOYD *v.* PETRIE 290

INSPECTORSHIP DEED—Forfeiture clause on insolvency 35
See FORFEITURE CLAUSE.

INTEREST ON CALLS *after Forfeiture.*] The articles of association of a company provided that if any member failed to pay any call due from him at the time appointed for payment thereof, he should be liable to pay interest for the same at the rate of 25 per cent. from that time to the time of actual payment; and also that the forfeiture of any share should involve the extinction at the time of the forfeiture of all claims and demands against the company in respect of the share, and all other rights incident to the share; but any member whose share had been forfeited was, notwithstanding, to be liable to pay to the company all calls owing on such shares at the time of forfeiture:—

Held, that a member whose shares had been forfeited was liable to pay calls owing at the time of forfeiture, but not any interest thereon.

In re BLAKELY ORDNANCE COMPANY. STOCKEN'S CASE .. 6

INTERIM INCOME—*Appointment of Part of Fund—Vesting at Twenty-one.*] Testator bequeathed £20,000 upon trust, after the decease of his daughter (a married woman), for all or such of her children as she should appoint; and in default, for all her children who

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should attain twenty-one, in equal shares as tenants in common. He gave powers of maintenance out of the income of the share to which any such child might be presumptively entitled; and powers of advancement to the extent of one-fourth of the portion to which any child should be presumptively entitled. The daughter, by her will, appointed the fund upon trust to raise for each of her two younger children, *F.* and *M.*, who should attain twenty-one, the sum of £2000, and subject thereto, as to the whole of the fund, to all her children who should attain twenty-one, in equal shares as tenants in common. She died leaving four children. The eldest of these having attained twenty-one :—

Held, that the child who had attained twenty-one was entitled to one-fourth of the income which had accrued since the death of her mother on the whole of the £20,000; and that she would, after payment to her of her share of capital, be entitled during the minorities of *F.* and *M.* to one-fourth of the income of the two sums of £2000 appointed to them in the event of their attaining twenty-one respectively.

GOTCH *v.* FOSTER 311

IRRESPONSIBLE TRANSFEREE, *Presumption as to Registration of—Delay in Registration—Contributory—Companies Act*, 1862, *s.* 35.] If the articles of association of a company provide that the directors may decline to register a transfer in any case where the directors consider the transferee to be an irresponsible person, a transferor cannot claim to have his name removed from the register under s. 35 of the *Companies Act*, 1862, on the ground of unnecessary delay, unless the transferee be a responsible person.

S. sold certain shares and executed a transfer of them to *F.* The transfer was deposited for registration with the company but was not registered. Six weeks afterwards the company was ordered to be wound up. *F.* proved to be an irresponsible person :—

Held, that *S.* must be placed on the list of contributories, although it would have been otherwise if *F.* had been responsible.

In re JOINT STOCK DISCOUNT COMPANY. SHIPMAN'S CASE .. 219

ISSUES, *when directed—Vivâ voce Evidence at the Hearing—Order of* 5*th of February*, 1861, *Rule* 3.] The right of a party to a suit in which issue has been joined to have the evidence in the cause taken *vivâ voce* at the hearing, is confined to cases where the facts and issues sought to be established are capable of being distinctly and concisely specified.

In a suit against a manager and a shareholder of a bank charging fraudulent withdrawals of, and speculations with, the bank moneys, an application by the Plaintiff that the evidence might be taken *vivâ voce* at the hearing as to the following facts and issues—whether or not the Defendants executed the instruments of transfer in the bill mentioned; whether they received any dividend warrants or other payments in respect of the securities referred to in the bill; and whether or not they were the proprietors of, or interested in, such securities,—was refused, as leading the Court to an unlimited inquiry, and as being unjust to the Defendants in not sufficiently stating the case to be made against them.

OTHER *v.* SMURTHWAITE 437

JOINT TENANCY, Tenancy in common, or 346
See IMPLIED GIFT.

JUDGMENT CREDITOR—*Sale under* 27 *&* 28 *Vict. c.* 112—*Summary*

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Remedy—Prior Elegit—Remedy by Bill.] A judgment creditor who has caused a writ of *elegit* to be issued, is not entitled to apply to the Court upon Petition in a summary way for a sale of his debtor's lands under 27 & 28 Vict. c. 112, s. 4, where his debtor's lands have been already extended and delivered to another judgment creditor under a prior *elegit*, although he is not prevented by the Act from filing a bill to assert his equitable rights.
In re Cowbridge Railway Company 413

JURISDICTION—Club, when expulsion from, restrained 63
See Club.

———— Executors in *England*—Foreign suit restrained 175
See Foreign Suit.

———— Mistake—Rectification of bill of exchange 131
See Mistake. 2.

———— Private Bill Costs Act—Injunction 444
See Private Bill Costs Act.

———— to recover money misapplied by solicitor 183
See Firm of Solicitors.

———— Trustee Act—Sole trustee pre-deceasing testatrix—Heir of testatrix unknown 332
See Sole Trustee pre-deceasing Testatrix.

LACHES—Return of deposit without correction of register—Contributory 118
See Return of Deposit.

———— Specific performance 527
See Trustee Act.

———— *Ultrà vires*—Amalgamation 450
See Amalgamation.

LANDS CLAUSES ACT—*Metropolis Improvement Act—Notice to treat—Tenant for Life and Reversioner in a Term of Years—Determination of Life Tenancy on ceasing to carry on Business on the Premises—Principle of Estimation of Value—Jury.*] A testator died in 1862, having bequeathed the residue of a term of years of which he was possessed, under a lease, in a house where he and his two sons carried on business to his executors, upon trust to permit and suffer his sons "to hold, use, occupy, and enjoy," the leasehold premises "so long as they may carry on the business together therein, as now carried on by me and them in partnership together," they paying a low rent to the executors, and the executors paying the rent reserved by the lease. He further declared that if his sons, or one of them, should at any time "decline" to carry on the business on the premises, his executors were to sell the same, with power to lease until sale. By an order of the Court the leasehold premises were directed to be sold whenever the sons, or the survivor, should "decline or cease to carry on business" on the premises. On the 8th of May, 1866, the Metropolitan Board of Works gave notice to treat for the premises, and by an order, made on a Petition presented by the executor, he was ordered to submit his claim to a jury, which he did, and obtained a verdict for £8222, which was stated to have been given on the footing of his being entitled to the whole residue of the term, subsequent to the 8th of May, 1866. The sons submitted their claim to arbitration, and had been awarded £4070. The Board of Works objecting to pay both sums:—

Held, that the valuation of the executor's interest ought to be made as of the interest which, at the moment when the premises were taken, he would have had if they had not been taken :

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Hence, that in order to arrive at such value, a deduction must be made from the whole value of the premises in respect of the contingency that the executor might have been compelled by the continuance of the sons' occupation to take a depreciated rent:

Held, further, that the balance after such deduction must be estimated by a jury, summoned in the usual way under the Act:

Held, also, that the sons were entitled to a sum equal to the present value of the improved rent of the premises, beyond the rent and outgoings payable by them for the residue of the term, during their lives and the life of the survivor, subject to a deduction in respect of the chance that they would have discontinued to carry on business.

PENNY *v.* PENNY 227

2. LANDS CLAUSES ACT, s. 69—*Re-investment in Land—Several Companies—Surveyor's Fee.*] On a Petition for re-investment in land of moneys paid in by several companies and public bodies, under sect. 69 of the *Lands Clauses Act*, the surveyor's fee was ordered to be borne by the several companies and public bodies rateably, according to the amount of the funds invested by them.

Ex parte CORPORATION OF LONDON 418

3. ——————, s. 82—*Costs of Title—Costs of Administration.*] A testator bequeathed leasehold property specifically. Some years after his death, and after the death intestate of his executor, the property was taken by the Corporation of *Liverpool* under powers conferred by an Act with which the *Lands Clauses Consolidation Act* was incorporated. The corporation required that letters of administration of the testator's estate should be taken out. This was done, and a conveyance taken from the administrator:—

Held, that the corporation were bound, under sect. 82 of the *Lands Clauses Consolidation Act*, to pay the costs of taking out administration.

In re South Wales Railway Company (14 Beav. 418) overruled.

In re LIVERPOOL IMPROVEMENT ACT 282

4. ——————, s. 128—*Superfluous Land—Right of Pre-emption—Adjoining Land—Intervention of Private Road—Land for Building Purposes.*] The right of pre-emption given by sect. 128 of the *Lands Clauses Consolidation Act*, to persons whose lands immediately adjoin superfluous land proposed to be sold by the promoters of the undertaking, extends to lessees for years of such adjoining lands.

Lessees of land separated from such superfluous land by a private road, of which they had the exclusive right of user during their tenancies:—

Held to be owners of "immediately adjoining land" within the same section.

In the same section the words "lands used for building purposes" mean lands sold as building land, or let on building leases, and actually laid out for building.

COVENTRY *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY 104

—————— Time for exercising compulsory powers .. 352
See NOTICE TO TREAT.

——————, s. 85—Railway Companies Act, 1867, s. 36—Amount of deposit 190
See COMPULSORY ENTRY ON LAND.

LEASE—Claim for future rent in winding-up 561
See CLAIM OF LESSOR AS FOR FUTURE RENT.

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LEGACY—Following assets 99
See FOLLOWING ASSETS.

LESSOR, Claim by, for future rent in winding-up 561
See CLAIM OF LESSOR AS FOR FUTURE RENT.

LICENSE—Public house—Transfer—9 Geo. 4, c. 61 336
See PUBLIC HOUSE LICENSE.

LIMITATIONS, STATUTE OF—*Bar by Certificate.*] In an administration suit instituted by a residuary legatee more than twenty years after the testator's death, the Chief's Clerk's certificate found that certain legacies remained unpaid, and, by the order on further consideration, liberty was given to any persons claiming to be entitled to the legacies to apply as to their payment. The legatees, who were not parties to the suit, having applied, under the order, for payment of their legacies:—

Held, that the residuary legatee was precluded by the certificate and order from setting up the *Statute of Limitations*.
PROWSE *v.* SPURGIN 99

2. ———————— *Trustee and Cestui que Trust—Breach of Trust—Acquiescence—Right of Cestui que Trust, who is also Trustee, to recover Trust Fund.*] By a marriage settlement made in 1821, stock belonging to the wife was assigned to *B.* and another, upon trust for the separate use of the wife for life, with remainder for the husband for life, with remainder, in default of children of the marriage, for *B.* The trustees neglected to have the stock transferred to them, and it remained in the name of the wife, and in 1822 the husband sold it, and possessed himself of the proceeds. *B.* died in 1829, the husband in 1858, and the wife in 1864. There were no children. In 1866 *B.*'s executors claimed the trust fund from the husband's estate:—

Held, that their claim was not barred by the *Statute of Limitations*, or by acquiescence, or by the fact that *B.* was one of the trustees whose negligence rendered the misapplication of the trust fund possible.
BUTLER *v.* CARTER 276

3. ———————— 3 & 4 *Will.* 4, c. 27, *s.* 2—*Adverse Possession—Acts of Ownership—Site of Ditch.*—A field adjoining a public road was separated from it only by a hedge and bank. It was held, as the result of evidence, that the trustees, who, under an Act of Parliament, constructed the road upwards of fifty years before the commencement of the suit, made the hedge and bank, and also made on the field side of the fence a ditch of three feet in breadth. This ditch had become filled up and obliterated, and had never been reopened by the trustees; but a ditch about a foot wide had been subsequently made by the occupier of the field, and that also had become obliterated. The owners of the land had always included the hedge in their leases, and the tenants had held and used the strip within the hedge as part of their field for much more than twenty years, and had at their own expense trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch:—

Held, that these circumstances were not sufficient to constitute adverse possession, and give the owners of the land a title under the *Statute of Limitations* to the site of the three-feet ditch.
SEARBY *v.* TOTTENHAM RAILWAY COMPANY 409

4. ———————— *Trustee and Cestui que Trust—Executor of Trustee.*] The analogy of the *Statute of Limitations* cannot be set

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up by an executor in answer to a claim founded on a breach of trust by his testator.
Dunne v. *Doran* (13 Ir. Eq. Rep. 545), and *Brereton* v. *Hutchinson* (2 Ir. Ch. Rep. 648; S. C. 3 Ir. Ch. Rep. 361), not followed.
BRITTLEBANK *v.* GOODWIN 545

LIMITED COMPANY—Set-off against call made before winding-up .. 214
See SET-OFF AGAINST CALL.

LIQUIDATOR, should not take part in contest between two solvent contributories 193
See CUSTOM OF STOCK EXCHANGE. 2.

LOAN OR PAYMENT UPON SHARES—*Contributory—Companies Act*, 1862, *ss.* 25, 153—*Winding-up.*] The directors of a bank, then in an insolvent condition, proposed to their shareholders that the holders of £10 shares, on which £7 had been paid, should advance £3 on this alternative: viz., if the bank should be able to go on the advance was to be treated as a loan at 10 per cent. interest, while if the bank were wound up, the advance was to be taken as paid upon shares in anticipation of calls. On the day that this proposal was made a friendly Petition was presented by one of the directors, on which (and two others) an order was ultimately made for winding up the company:—
Held, that the presentation of this Petition rendered the arrangement come to on the same day invalid under sect. 153 of the *Companies Act*, 1862, as being an "alteration in the *status* of the members of the company made between the commencement of the winding-up and the order for winding up," and that shareholders who had made the advance with full knowledge of the presentation of the Petition were not entitled to adopt the alternative of treating it as paid upon their shares in anticipation of calls.
Semble, that the arrangement was also invalid under sect. 25, as the money advanced had not been entered on the register as "an amount paid or agreed to be considered as paid on the shares."
In re ORIENTAL COMMERCIAL BANK. BARGE'S CASE. 420

LOOMS—Fixtures 72
See FIXTURES.

LORD OF MANOR—Covenants by lord on sale of freeholds 115
See COURT ROLLS.

LUNACY—*Ademption by Order for sale of Shares in—Lunacy Regulation Act*, 16 & 17 *Vict.* c. 70, *ss.* 2, 119.] A testator, by will, bequeathed the income of certain shares specifically, and bequeathed the shares to his residuary legatee. After the date of the will, he was found a lunatic, and by an order in the lunacy the shares were directed to be sold, and the proceeds were invested in consols:—
Held, that as the provisions of the *Lunacy Regulation Act*, whereby the rights of owners of property sold by order of the Lord Chancellor in Lunacy are preserved, extend only to land, the gift of income was adeemed by the sale, and the sum of consols fell into the residue.
JONES *v.* GREEN 555

MANAGER—Share of profits—Principle of account 326
See PROFITS OF BUSINESS.

MANOR—Covenants by lord on sale of freeholds—Production of Court rolls 115
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MEASURE OF DAMAGES—Infringement of patent 81
See DAMAGES, MEASURE OF.

MERCANTILE LAW AMENDMENT ACT (19 & 20 *Vict. c.* 97), *s.* 5 —*Whether retrospective—Surety—Contract prior to passing of Act—Subsequent Breach and Payment.*] Section 5 of the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97) applies to a contract entered into before the passing of the Act, provided a breach of it has taken place, and payment has been made by the surety after the passing of the Act.

In 1854, *W.*, as surety, joined in a bond with *C.* The Act was passed in July, 1856. In December, 1856, the condition of the bond was broken, and *W.* paid the amount due on the bond in January and April, 1857:—

Held, that *W.* was entitled to rank as a specialty creditor of *C.* *In re* COCHRAN'S ESTATE. DE WOLF *v.* LINDSELL 209

MISREPRESENTATION—Contract—Acreage 485
See SUB-CONTRACT.

———— Solicitor—Bill to recover money under—Jurisdiction 183
See FIRM OF SOLICITORS.

MISREPRESENTATION IN PROSPECTUS—*Rectification of Register—Scienter—Remedy against Directors as well as against Company, notwithstanding subsequent Winding-up—Costs of Application for leave to proceed.*] In February, 1865, a company was incorporated with a capital of £25,000, in 2500 shares. The articles provided that the first directors should be determined by the subscribers to the memorandum of association; that the qualification of the directors so appointed should be ten shares, and of future directors, thirty shares; and that the promoter should receive £2500 as promotion money. In the same month a prospectus was issued, giving the names of seven persons of position (not the subscribers to the memorandum), one of them of considerable local influence, as directors, and stating that "the directors and their friends have subscribed a large portion of the capital, and they now offer to the public the remaining shares." The facts were that the directors had subscribed for, nominally, only ten shares each, and actually nothing, for the shares agreed to be allotted to them were fully paid-up shares, for which they paid, and were, by a private arrangement with the promoter, afterwards repaid out of the £2500. The number of shares taken by "friends" of the directors—treating that word as persons who became subscribers through their influence—consisted only of 140, which were taken by one firm. The whole number of shares taken was 762, and agreed to be taken besides, 430. Plaintiff applied, on the faith of the above prospectus, for fifty shares, which on the 15th of March were allotted to him, and on which he paid £25 deposit, and £75 allotment money. The directors admitted that the prospectus was issued by their authority:—

Held, that the statement in the prospectus was a clear misrepresentation, which overthrew the contract between the Plaintiff and the company; and that, as the statement related to the directors' own acts, they must be fixed with a guilty knowledge of the misrepresentation.

Since the filing of the bill, and the hearing of a motion for an injunction to stay proceedings in an action upon a call, the company had been ordered to be wound up:—

Held, that the Plaintiff was entitled to repayment of his £100 (but without interest) and costs, against the directors, and (notwithstanding the winding-up) against the company; to have his name

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removed from the register of shareholders; to an injunction to restrain the company from taking further proceedings on the judgment, and from instituting any further proceedings against the Plaintiff in respect of his having been a shareholder; with liberty to proceed as he might be advised in the winding-up matter, in respect of the payment of his £100 and costs.

In re Reese River Company, Smith's Case (Law Rep. 2 Ch. 604) followed.

The costs of an application in the liquidation (in another branch of the Court) for leave to proceed in this suit, were ordered to be included in the costs of the suit.

HENDERSON *v.* LACON 249

MISTAKE—*Relief, where not Mutual—Vendor and Purchaser—Suit to rectify Conveyance—Option to annul Contract—Costs.*] The rule that the Court will not interfere to rectify an instrument unless it is proved that the mistake was common to both parties, does not apply to the case of a contract which has been executed between parties in the relation of vendor and purchaser, whom it is in the power of the Court to replace in their original position.

Accordingly where, in a conveyance of messuages, the plan on the deed comprised a piece of land not intended by the vendor to be included, a decree was made to rectify the deed, an option being given to the purchaser to have his contract annulled; but, having regard to the conduct of the parties, no costs were given on either side.

HARRIS *v.* PEPPERELL 1

2. ———— *Equitable Remedy—Bill to rectify Bill of Exchange after Action at Law.*] *Semble*, a Plaintiff suing at law upon an instrument will not be allowed at law to adduce evidence to shew that the instrument does not correctly represent the agreement entered into.

A renewed bill of exchange was drawn out, with a blank for the drawer's name, by an agent of the Plaintiff, who, by mistake, inserted above the place where the drawer's name was afterwards inserted, the name of the Plaintiff, and the signatures of the drawer and acceptor were afterwards added, and the bill indorsed to the Plaintiff; Plaintiff sued the drawer at law, and on the Defendant pleading that the Plaintiff's name appeared as drawer of the bill, the Plaintiff filed a bill for rectification. To this a demurrer was overruled, on the double ground of the non-admissibility of evidence in an action by the Plaintiff at law to prove the real contract, and of the established jurisdiction in equity to correct mistakes in documents.

Observations on the proper course of procedure to remedy a mistake in a Plaintiff's document.

DRUIFF *v.* LORD PARKER 131

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MORTGAGE—Public House—Mortgagees not assigns within 9 Geo. 4, c. 61, s. 11 336
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See ILLEGITIMATE CHILDREN.

NOISY CROWDS — *Fireworks — Music—Nuisance—Injunction.*] The collection of a crowd of noisy and disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainments is liable to an injunction; even though he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police.

Semble, that letting off rockets and establishing a powerful band of music which plays twice a week for several hours continuously within 100 yards of a dwelling-house, are nuisances which this Court will restrain.
WALKER *v.* BREWSTER 25

NOTICE OF ASSIGNMENT—*Priority — Bankruptcy of Assignor — Order and Disposition—Debt of Company—Notice to Official Liquidator.*] Notice to an official liquidator of the assignment of a debt due from the company is sufficient to perfect the assignment, and upon the subsequent bankruptcy of the assignor the debt does not vest in his assignee in bankruptcy as being in his order and disposition.
In re BREECH-LOADING ARMOURY COMPANY. WRAGGE'S CASE .. 284

NOTICE TO TREAT—*Time within which Powers may be exercised—Delay.*] Where a railway company with compulsory powers under their Act for the purchase of land, to be exercised within a prescribed period, serve a notice to treat on a landowner, they must, in order to exercise their powers, come to an agreement with the landowner, or ascertain the price to be paid to him, within reasonable time—that is, within the period fixed by the Act for the completion of the line; and when that period has expired without any step being taken beyond the service of the notice and the claim by the owner, the powers of the company to take the land under the notice cease to be operative.

A railway company with an Act limiting the time for the exercise of the compulsory powers to four years, and the time for the completion of the line to five years from the passing of the Act, served a notice to treat within the four years on landowners, whose claim for compensation was not assented to. Nothing further was done till after the five years had expired, when the company claimed to proceed under the notice. The landowners filed a bill to restrain the company from taking the land under the notice:—

Held, that the company could not then proceed under the notice.
RICHMOND *v.* NORTH LONDON RAILWAY COMPANY 352

NOTICE TO TRUSTEE — *Reversionary Interest — Assignment—Insolvency—Priority.*] Formal notice to the trustee of a fund in which an insolvent is interested, is necessary to give the assignee in insolvency priority over subsequent incumbrancers who have given notice. Therefore knowledge of the insolvency acquired *aliunde* by the solicitor of the trustees *held* insufficient to give priority to the assignee.
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PAID-UP SHAREHOLDER—*Not Contributory though indebted—Companies Act*, 1862, *ss.* 74, 101.] A holder of fully paid-up shares in a company, although indebted to the company, cannot be put on the list of contributories.
In re MARLBOROUGH CLUB COMPANY 365

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PLEA OF RELEASE—*Bill for Account—Pleading—Non-production of Accounts impeached—Insufficiency.*] A plea of release to a bill for an account is insufficient unless it sets out by way of averment the accounts which form its consideration.

To a bill by a *cestui que trust* against the trustees of a testator's estate seeking to set aside a release which he alleged had been improperly obtained from him, and the recitals of which he alleged to be untrue, and praying for the administration of the estate and the usual accounts and directions, the Defendants, as to so much of the bill as sought to have the estate administered and for an account, pleaded the release which they therein set forth, with its recital that true and correct accounts had been rendered, but they set forth no statement of the accounts in question, and answered the rest of the bill:—

Held, that the plea must stand for an answer, with liberty to except.
BROOKS *v.* SUTTON 361

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——— Notice of insolvency, what sufficient 88
See Notice to Trustee.

PRIVATE BILL COSTS ACT (28 *Vict. c.* 27), ss. 1, 3, 5—*Certificate of Taxing Officer—Injunction—Jurisdiction.*] The *Private Bill Costs Act* provides (sect. 5) that the validity of such a certificate of costs

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as that prescribed by the Act "shall not be called in question in any Court."

Where a certificate of costs had been obtained from the taxing officer, certifying that two promoters of a private bill were the parties liable to pay a sum of costs, and the taxation of such costs had been made in the absence of, and without notice having been given to one of such promoters; the certificate being regular in point of form, and consequently not assailable at common law:—

Held, that the Court of Chancery, in exercise of its jurisdiction to set aside judgments obtained by fraud, had, notwithstanding the above enactment, jurisdiction to restrain an action commenced upon such certificate against the promoter (who had no notice); and that the other promoter was not a necessary party to the suit.

SWANSEA CANAL PROPRIETORS *v.* GREAT WESTERN RAILWAY COMPANY 444

PRODUCTION—Inspection of impeached documents before decree .. 290
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PROFITS OF BUSINESS—*Manager of Works—Agreement—Salary—Principles on which Account should be taken.*] The Defendant, in 1858, agreed that the Plaintiff should act as the manager of his works, and should receive in each year 7½ per cent. of the profits of the business, to be made up to £500 in any year in which the said share of profits should be less than that sum. In the same year a valuation of the buildings, stock, plant, and goodwill was made. In 1864 the Defendant sold the buildings, stock, and business at an increase over the valuation of £47,916.

In taking the accounts under the above agreement:—

Held, that the Defendant was not entitled to charge the profit and loss account in every year with interest on his capital, nor with interest on old debts, nor with £500 in respect of the Plaintiff's salary:

Held, further, that the Defendant was entitled to charge the profit and loss account in every year with sums representing the depreciation arising from the running out of the lease, and the waste of plant and machinery:

Held, also, that the Plaintiff was not entitled to treat as profit of the year in which the property was sold, the excess of the amount realized by the sale over the estimated value; but that the estimated value of stock first set down must run through the whole account; the annual depreciations being calculated on that constant quantity.

RISHTON *v.* GRISSELL 326

PROSPECTUS, Misrepresentation in—*Scienter* 249
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PUBLIC HOUSE LICENSE—*Sale as going Concern—Specific Performance—9 Geo. 4, c. 61, ss. 11, 14.*] Upon the sale of a public-house as a going concern time is of the essence of the contract; and, in the absence of express stipulation to the contrary, the license of the house must be transferred under sect. 11 of the *General Licensing Act* (9 Geo. 4, c. 61), and not under sect. 14.

Where, therefore, upon the day fixed for completion of a sale of a public-house as a going concern, the vendors were not in a position to procure a transfer of the license under sect. 11:—

Held, that the purchaser was entitled to repudiate the contract.

Mortgagees of a public-house are not assigns of the licensee within the meaning of 9 Geo. 4, c. 61, s. 11.

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REAL ESTATE—What words pass 404
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RE-BORROWING, *Power of—Companies Clauses Act*, ss. 39, 40.] In December, 1859, a railway company having power to borrow £60,000 by debentures had raised the whole. In October, 1864, whilst the whole of the debt was outstanding, the directors issued a debenture for £500 to *W.* In November, 1864, *Q.*, the holder of twelve debentures for £500 each, recovered judgment, and, by taking the rolling stock in execution, satisfied his debt; and in December, 1864, *K.*, the holder of five debentures for like amounts, obtained in like manner payment of four of them and part payment of the fifth. In February, 1865, the directors re-issued four debentures for £500 to *E.*, in return for his cheque for £1000, and an over-due *Lloyd's* bond for £1000. In March, 1865, they re-issued ten more debentures for £500 to *E.* for cash; and in July, 1865, they issued a debenture for £1000 to *L.* under an agreement for the hire of engines. No general meeting was held, under the 39th section of the *Companies Clauses Act*, to confirm this re-borrowing:—

Held, that the debenture issued to *W.* was void; that the debentures issued to *E.* for cash were valid, notwithstanding the want of a general meeting, but that the debentures issued in exchange for the *Lloyd's* bond were good only to the extent to which the bond might be good, and that those issued under the agreement with *L.* were good only to the extent of moneys actually advanced.
FOUNTAINE *v.* CARMARTHEN RAILWAY COMPANY 316

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REDUCTION OF CAPITAL AND SHARES—30 & 31 *Vict. c.* 131—*Form of Orders.*] Three months from the date of the final order is a proper period at the end of which the addition of the words "and Reduced" to the name of a company petitioning for an order confirming resolutions for the reduction of their capital, under the *Companies Act*, 1867, may, under the 10th section of the Act, be discontinued.
Form of order and minute considered.
In re SHARP, STEWART, & Co. 155

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RESCINDING—Notice—Reasonable time 527
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RETURN OF DEPOSIT *without correction of Register—Contributory—Laches.*] A shareholder in a company, being in a position to file a bill against the company to have his name removed from the register, wrote to the secretary declining to have anything further to do with the company, and requesting that his deposit might be returned. The deposit was returned, but his name remained on the register of shareholders. Eighteen months afterwards the company was ordered to be wound up:—
Held, that he was not a contributory.
In re CANADIAN NATIVE OIL COMPANY. FOX'S CASE 118

REVERSIONARY INTEREST—Notice to trustee, what sufficient .. 88
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REVIVOR AND SUPPLEMENT—15 & 16 *Vict. c.* 86, s. 52—"*Change or Transmission of Interest*"—*Death of Party—Want of Privity.*] An order of course of revivor and supplement, under sect. 52 of 15 & 16 Vict. c. 86, cannot be obtained on the ground that the suit has become "defective by reason of some change or transmission of interest or liability," when, in consequence of the death of a Plaintiff or Defendant, a fresh interest has arisen in another person, not a party to the suit, and when there is no privity between the party who has died and the person, not a party, who so succeeds.

Accordingly, where, after decree in an administration suit, a Defendant died who if she had lived would have been entitled equally with the Plaintiff to the residue of the testator's estate, but on whose death the Plaintiff's interest became limited under the will to a specific sum, and the surplus devolved on a class of persons not claiming under the Defendant, and who were not parties to the suit:—

Held, that an order of course of revivor and supplement obtained by the Plaintiff under sect. 52 was irregular, and that the persons whose interest had arisen must be brought before the Court by an original bill.
HILLS *v.* SPRINGETT 123

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SCRIPHOLDER *not a Contributory.*] The articles of association of a limited company formed under the *Companies Act*, 1862, provided that the directors instead of entering allottees of shares on the register of members, might issue to them scrip certificates entitling the holders to the shares therein named, subject to the payment of the instalments at the times therein mentioned, that the word "shareholder" should include scripholder, that the shares for which scrip was issued should be transferable by delivery of the scrip, and the holder of the scrip should be the only person recognised as entitled to the shares, and that the scripholder on surrendering his scrip should be entitled to be entered on the register of members in respect of the shares mentioned in the scrip certificate. The company being wound up:—
Held, that a scripholder was not a contributory.
In re LITTLEHAMPTON, HAVRE, AND HONFLEUR STEAMSHIP COMPANY. ORMEROD'S CASE 110

SET-OFF AGAINST CALL *made before Winding-up—Limited Company—Contributory—Companies Act*, 1862, s. 101.] A contributory of a limited company being wound up by the Court under the *Companies Act*, 1862, is not entitled, in the absence of special agreement, to set off money due to him from the company against a call made before the winding-up.
Whether such an agreement would be *intrà vires, quære.*
In re BREECH-LOADING ARMOURY COMPANY. CALISHER'S CASE 214

SET-OFF OF DEBT PAYABLE IN FUTURO AGAINST CALL.] The directors of a joint stock company redeemed at a discount a debenture of the company held by *H.*, a director, two years before it was payable, and allowed *H.* to set off the redemption money against a call then due on his shares. Two months afterwards the company was ordered to be wound up by the Court:—
Held, that the set-off could not be allowed, and that *H.* remained liable to pay the call.
In re MASONS' HALL TAVERN COMPANY. HABERSHON'S CASE 286

SETTLED ESTATES ACT (19 & 20 *Vict. c.* 120)—*Infant—Guardian to consent.*] In a Petition under the *Settled Estates Act* for a sale of property in which an infant is interested in remainder the consent of the testamentary guardian of the infant is not sufficient, and a guardian must be appointed for the purpose of consenting on behalf of the infant.
In re ROBERT JAMES, DECEASED 334

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SOLE TRUSTEE PRE-DECEASING TESTATRIX—*Trustee Act*, 1850, *s.* 11—*Vesting Order—Heir of Testatrix not found.*] Where a testatrix devised real estate on trust for sale, but there had never been a trustee of the will, in consequence of the death in the testatrix's lifetime of the sole trustee named in the will; and it was not known who was the heir of the testatrix:—

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Held, that the Court had no jurisdiction under the *Trustee Act*, 1850, in the absence of the heir, to appoint a trustee and to make an order vesting in him the real estate descended.
GUNSON *v.* SIMPSON 332

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SUB-CONTRACT—*Misrepresentation—Refusal of Sub-purchaser to complete—Cancellation of Original Contract—Right of Sub-purchaser to recover Instalments of Purchase-money—Lien—Jurisdiction—Bonds of Company being wound up—Parties—Third Parties interested in Contract.*] *W.* agreed in writing to purchase from *B.* a mineral estate for £250,000, payable by instalments, and subsequently agreed in writing to sell the same property to a company which he had promoted, the price to be £350,000, payable by instalments, and as to £75,000 of it, payable in the company's bonds. Both agreements provided that the estate, as to extent of acreage, should be taken as conclusively shewn by the title deeds, and neither agreement specified the acreage, but *B.* told *W.*, and *W.* told the company, that it contained 1530 acres, both *B.* and *W.* believing the statement to be true. The company, before they made the agreement, had the estate inspected and valued by a mining surveyor, but there was no evidence as to whether or not he measured it. After *W.* had paid *B.* £50,000, and the company had paid *W.* £75,000, and given him their bonds for £75,000, the company refused to complete their purchase, alleging that the estate contained less than 1100 acres. *W.* thereupon refused to complete his purchase on the same ground, and brought an action against *B.* to recover the £50,000, and also for damages. *B.* offered to *W.* to reduce his purchase-money by £50,000, and *W.* made a like offer to the company, but both offers were refused. The action was compromised, *B.* repaying to *W.* the £50,000, and the agreement between them being cancelled by mutual consent. The company was wound up, and the official liquidator, six months after the company's repudiation of the purchase, instituted a suit against *W.* for the cancellation of their contract, for the repayment and return by *W.* of the £75,000 and bonds, and for an injunction to restrain *W.* from negotiating or parting with the bonds. The bill did not allege that the deficiency of acreage in fact existed, and there was no evidence on the subject. £5000, part of the £50,000 repaid by *B.* to *W.*, was paid into Court under an order in the cause :—

Held, that the company were not entitled to have the contract rescinded on the ground of misrepresentation ; that they could not sustain a suit in equity to recover the instalments of purchase-money ; that they had no lien on the £50,000 repaid by *B.* to *W.* ; and that as to the bonds the suit was unnecessary, because they could only be assigned by *W.* subject to the equities between him and the company, and also because the company could not be sued upon them without the leave of the Court ; and the bill was dismissed without prejudice to any rights at law.

After his agreement with *B.*, *W.* agreed with *C.*, *D.*, and *E.*, to share with them in certain proportions the profit to be made by the resale of the estate ; *W.*, *C.*, *D.*, and *E.*, together got up the company, and part of the money received by *W.* from the company was disposed of by them jointly. *C.*, *D.*, and *E.*, were made parties to the suit, and the bill sought to make them liable to the company for the money and bonds received by *W.* :—

Held, that they were not so liable, and were improperly made parties to the suit.

Aberaman Ironworks *v.* Wickens 485

SUBPŒNA TO HEAR JUDGMENT, Motion to dismiss 435
See Dismissal for Want of Prosecution. 2.

SUPERFLUOUS LAND—Pre-emption 104
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SURETY—Contract before, and breach after—Mercantile Law Amendment Act—Surety—Specialty Creditor 209
See MERCANTILE LAW AMENDMENT ACT.

SURVIVING BROTHERS—*Devise to, after Life Estates.*] Devise of residue to testator's wife for life, then to his daughter *A.*; upon her decease equally between his surviving brothers and sisters and those of his wife. The testator's wife and daughter survived him, but the daughter predeceased the widow. Some of the brothers and sisters predeceased the daughter; the others survived her, but predeceased the widow:—

Held, that the words "surviving brothers and sisters" referred to those who should survive the last living tenant for life, and that, in the events that happened, there was an intestacy.
HOWARD *v.* COLLINS 349

TENANCY IN COMMON—*Executory Settlement, how to be executed.*] By a deed it was, amongst other things, agreed and declared that *A.*, his executors, administrators, and assigns, should raise out of certain hereditaments £800, and should invest the same in the names of trustees at interest upon government or real securities "upon trusts to be declared for the benefit of *J. R.*, for her life, with remainder to her children, and as to the said *J. R.* to and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the £800 was ever made:—

Held, that the deed was executory only, and that the settlement so directed ought to have limited the £800, after the death of *J. R.*, amongst her children as tenants in common, and not as joint tenants.
MAYN *v.* MAYN 150

———————, Joint tenancy or 346
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TENANT FOR LIFE AND REMAINDERMAN—Bonus—New paid-up shares, whether capital or income 238
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TIME—Exclusion of Vacation on motion to dismiss 266
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TRADE NUISANCE—*Pollution of Air—Delicate Manufacture—Injunction refused.*] It is no answer to a complaint by a manufacturer of a nuisance to his trade, to say that the injury is felt only by reason of the delicate nature of the manufacture.

But the circumstances that the injury done is accidental and occasional only, that careful precautions are taken, and that there is no exceptional risk, such as arises from the storage of gunpowder or highly inflammable materials, are grounds for refusing an injunction, and leaving the Plaintiff to his remedy by action.

Where a maker of cocoa-nut matting, using chloride of tin in his bleaching liquid, complained of injury to his fabrics by reason of the chloride of tin being discoloured by sulphuretted hydrogen, thrown off

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by the Defendant in a manufacturing process carried on upon adjoining premises; and the evidence shewed that, owing to the Defendant's precautions, on three occasions only had an appreciable escape taken place, and then only from accidental defects which were immediately remedied—an injunction was refused without prejudice to an action at law.

Cooke *v.* Forbes 166

TRANSFER—Delay in registration by transferee 293
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TRUSTEE—Breach of trust—Statute of Limitations cannot be set up by executor of trustee 545
See Limitations, Statute of. 4.

TRUSTEE ACT, 13 & 14 VICT. c. 60, ss. 9, 10—*Vendor and Purchaser—Specific Performance—Ambiguity—Parol Evidence—Statute of Frauds—Laches—Notice to Rescind—Limited Title—Costs.*] In November, 1861, *S.* agreed to purchase from the Plaintiff "the mill property, including cottages in *Esher* village—all the property to be freehold," and verbally agreed to take a limited title. The property was identified by parol evidence. Negotiations were carried on as to the title till June, 1863, when it was accepted subject to certain requisitions, of which the principal was this:—Part of the property was copyhold, and had been devised by a testator to one of his daughters in fee. After his death the two daughters of the testator, being coheiresses, were admitted as tenants in common, and when the Plaintiff enfranchised the copyhold the conveyance was made to the two daughters, their heirs and assigns. The daughter not beneficially interested refused to convey the legal estate, and an order was obtained from the Court vesting the legal estate, under the 9th section of the *Trustee Act*, in trustees for the other daughter. The purchaser objected that the order should have been made under the 10th section of that Act, and upon this objection negotiations went on till December, 1864, when the purchaser gave notice that unless within one week the vendor would agree to comply with the requisitions, he should require a good marketable title to the whole property, and if that were not shewn within five weeks the contract would be treated as rescinded:—

Held, upon bill for specific performance, filed in August, 1865, that the contract was not void for ambiguity, parol evidence being admissible for identification; that it was not void for delay, which could only be computed from the termination of negotiations till the filing of the bill; that the purchaser having agreed to accept a limited title, and the negotiations having gone on upon that footing, a complete title could not be demanded; that the time limited by the notice to rescind was not reasonable; and that the vesting order was properly made under the 9th section of the *Trustee Act*.

Decree for specific performance, limiting the inquiries as to title to the objections specified in June, 1863. Costs up to the hearing to be paid by the purchaser.

McMurray *v.* Spicer 527

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TRUSTEE AND CESTUI QUE TRUST—Statute of Limitations—Trustee also a *cestui que trust* 276
See LIMITATIONS, STATUTE OF. 2.

ULTRÀ VIRES—Amalgamation 450
See AMALGAMATION.

UNBORN ISSUE—*Gift to, for Life and to Representatives of Survivor—Absolute Interest in Survivor—Remoteness.*] Bequest of personal estate to unborn issue as tenants for life, and to the executors, administrators, and assigns of the survivor of the unborn issue, gives an absolute interest to the survivor, and is not too remote.
AVERN *v.* LLOYD 383

UNREGISTERED COMPANY—*Mutual Insurance—Winding-up—Contributory—Guarantee—Companies Act*, 1862, *s.* 200.] The rules of an unregistered mutual marine insurance company provided that where any ship insured with the company was mortgaged, the mortgagee should give a guarantee for the payment of all averages and contributions due or to become due in respect of the ship :—

Held, that a mortgagee who had given such a guarantee to the company was not a contributory within the meaning of the *Companies Act*, 1862, s. 200.
In re SHIELDS MARINE INSURANCE ASSOCIATION. LEE AND MOOR'S CASE 368

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VENDOR'S LIEN AGAINST RAILWAY COMPANY—*Purchaser and Lessee—Parties—Specific Performance.*] Bill by unpaid vendors against two railway companies—the purchasers and their lessees—in possession of the land, for specific performance of the contract; for payment of the purchase-money; for an injunction against both companies: for a declaration of lien, and that it might be enforced by a sale; and that a receiver might be appointed of the rents and profits of the purchaser's estate.

The Court *held* that the lessees were properly made parties;

Decreed specific performance and payment of the purchase-money within three months;

Declared a lien as against both companies; and gave leave, in case the money should not be paid, to apply for an injunction, and for the appointment of a receiver to enforce the lien.

BISHOP OF WINCHESTER *v.* MID-HANTS RAILWAY COMPANY. .. 17

"VESTED" READ "INDEFEASIBLE"—*Vesting at Twenty-five—Remoteness.*] Testatrix bequeathed her residue, consisting wholly of personalty, upon trust, as to one-fifth share thereof, to pay the income to her great nephew *H.* for life, and at his decease to pay the share unto and among all and every the children and child of *H.*, if more than one, equally; as to the other four-fifths, upon like trusts for the benefit of testatrix's great nieces and nephews, *R.*, *P.*, *T.*, and *A.*, and their children respectively. In the event of the death of any one or more of them, the said *H.*, *R.*, *P.*, *T.*, and *A.*, without leaving issue, she directed that the share or shares of him, her, or them so dying should be in trust for the survivor or survivors of them, and the income and capital be paid and divided in the same manner as was directed as to the original shares. She then directed that none of the said shares should be "so paid to or become vested interests in" any of the said children of the said *H.*, *R.*, *P.*, *T.*, and *A.*, until he, she, and they attained the age of twenty-five respectively; and that in the meantime it should be lawful for the trustees to pay any part of the income from "such shares respectively towards the maintenance and education of such children respectively." The will then contained a proviso (which was admitted to be void for remoteness) that if any of the said children of the said *H.*, *R.*, *P.*, *T.*, and *A.* should die before attaining twenty-five, the shares or share of him, her, or them so dying should accrue to the survivors and survivor. Testatrix then declared that, in case of the death of any other of the said children "before such accruing or surviving shares shall become vested as aforesaid," every such accruing or surviving share should again be subject to the same condition of accruer: provided nevertheless that, in case any of such child or children should have left issue, such issue should take such share in the trust funds as his, her, or their deceased parent or parents would have had "if living;" and such share or shares "to be paid to" such issue at such age or time as thereinbefore was directed with respect to the payment of their parents' original shares:—

Held, that the word "vested" must be construed as meaning "indefeasible;" and that the remainders to the children of *H.*, *R.*, *P.*, *T.*, and *A.* vested in such of the said children as were alive at the death of the testatrix, or were born afterwards.

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WINDING-UP AFTER CREDITORS' DEED — *Division of Assets—Dividend under Deed prior to Winding-up—Companies Act*, 1862, ss. 133, 164.] Under s. 133 of the *Companies Act*, 1862, the assets of a company which is being wound up must be applied in satisfaction *pari passu* of the liabilities of the company as they exist at the commencement of the winding-up.

Where, therefore, prior to the winding-up, a dividend had been paid under an inspectorship deed to some creditors of the company, but not to others :—

Held, that there being no question of fraudulent preference, those who had not received any dividend were not entitled to a dividend under the winding-up in priority to those who had.
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